FOR ARGUMENT

IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1546

WILLIAM H. STAFFORD, JR., STUART J. CARROUTH, and CLAUDE MEADOW,

Petitioners,

—v.—

JOHN BRIGGS, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

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OPINION BELOW

The opinion of the court of appeals (Pet.App. A at 1a-19a) is reported at

569 F.2d 1. The opinion of the district court (Pet.App. C at 25a-26a) is not reported.

STATUTE INVOLVED

PUBLIC LAW 87-784; 76 STAT. 744

[H.R. 1960]

An Act to amend chapter 85 of title 28 of the United States Code relating to the jurisdiction of the United States district courts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

Chapter 85 of title 28 of the United States Code 24 is amended - (a) By adding at the end thereof the following new section: "§1361. Action to compel an officer of the United States to perform his duty

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

(b) By adding at the end of the table of sections for chapter 85 of title 28 of the United States Code the following:

"1361. Action to compel an officer of the United States to perform his duty."

Sec. 2 Section 1391 of title 28 of the United States Code is amended by adding at the end thereof the following new subsection: "(e) A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated or (4) the plaintiff resides if no real property is involved in the action.

"The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought."

Approved October 5, 1962. 1/

1/ 28 U.S.C. §1391(e) as amended in 1976, includes the following sentence after the last sentence of the first paragraph:

(fn. cont. next page)

COUNTER STATEMENT OF THE CASE

The proceeding herein arises out of an action for declaratory relief and for damages for violation of respondents' constitutional and civil rights. This civil suit concerns action by a number of government officials in relation to a prosecution which emerged as United States v. Camil, GCR 1344 (N.D. Fla.) and super-

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> Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

In addition, the word "each" in the first paragraph of §1391(e) is changed to "a." P.L. 94-574, §3, 90 Stat. 2721 (Oct. 21, 1976).

ceding indictment and trial in United States v. Briggs, GCR 1353 (N.D. Fla.)[2/] The issues herein are purely procedural and relate to venue and personal jurisdiction.[3/]

2/ Respondents are the plaintiffs in the case sub judice. Eight of them were defendants in the criminal case, United States v. Briggs, supra. They were found not guilty after a jury trial. The other two respondents were held in contempt for refusing to answer questions before the grand jury. Their convictions were reversed on appeal. Beverly v. United States, 468 F.2d 732 (5th Cir., 1972). See also United States v. Briggs, 514 F.2d 794 (5th Cir., 1975). Petitioners are three of the four defendants in the civil action Briggs, et al. v. Goodwin, et al. Their co-defendant, Guy Goodwin, is not a party to this proceeding. See n. 4 infra.

3/ Questions of prosecutorial immunity are not involved at this time. Defendant Goodwin, but not petitioners, moved to dismiss the complaint against himself on grounds of prosecutorial immunity. The district court denied the motion (Pet.App. at 20a-23a) and the court of appeals having accepted certification, affirmed. Briggs v. Goodwin, 569 F.2d 10 (D.C. Cir., 1977), cert. denied, 437 U.S. 904 (1978).

The three petitioners, together with defendant Goodwin,[4] are being sued for civil actions taken by them under color of law and in their official roles as federal government employees, but beyond the scope of their authority.[5] These actions occurred during a grand jury proceeding and subsequent criminal prosecution.

The gravamen of this action is that petitioners together with defendant Goodwin, an attorney for the Department of Justice, Division of Internal Security, conspired to violate respondents' rights under the First, Fourth, Fifth, Sixth,

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4/ The action against Goodwin is proceeding in the District Court. See discussion infra at 15.

5/ The complaint and amendment to complaint are printed in the Appendix (App. at 8-31).

Eighth, and Ninth Amendments, by arranging the presence of one or more informers among grand jury witnesses and in the defense camp of United States v. Briggs, supra, and concealing such arrangement by perjury before the District Court.

More specifically, respondents allege that petitioners and defendant Goodwin were responsible for conducting the grand jury investigation to which respondents and thirteen other members of the Vietnam Veterans Against the War were subpoenaed. They were summoned from such widely scattered places as Arkansas, Delaware, New York, Texas, Louisiana, and Washington, D.C., and required to appear in Tallahassee, Florida, on July 10, 1972, on less than three days' notice. Because many of the subpoenees did not know each other and because they were concerned

about the possibility of infiltration by government agents or informers, respondents, by their attorneys, moved that petitioners and defendant Goodwin be required to disclose whether any of 18 named persons were agents or informers of the government. On the following day, in response to that motion and after argument in open court, the District Court ordered defendant Goodwin to take the stand and the following occurred:

THE COURT:

Mr. Goodwin, take the witness stand. Swear the witness, Mr. Clerk.

thereupon,

GUY GOODWIN

was called as a witness, having been first duly sworn to speak the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE COURT:

Mr. Goodwin, are any of these witnesses represented by counsel agents or informants of the United States of America?

THE WITNESS:

No, Your Honor.

THE COURT:

You can step down.

(Witness excused.)

MR. LEVINE:

Your Honor, may we be permitted to question Mr. Goodwin on this?

THE COURT:

No, unless you have some information that is contrary to what counsel for the Government has testified.[6/]

6/ The last nine words of the above collaqry does not appear in the exhibit to the complaint which is printed in the Appendix (App. at 27-28). The actual record of the grand jury proceeding shows that the colloquy continued for another five pages,

(fn. cont. next page)

The complaint alleges that the defendant Goodwin made the foregoing representation "on behalf of all defendants [including petitioners] and with their full knowledge." (App. at 13).

More than one year later, in the midst of the trial of United States v. Briggs, et al., supra, one of the 18 named persons, Emerson L. Poe, was revealed to have been a paid FBI informer for more than six months prior to defendant Goodwin's testimony. He surfaced as an

(fn. cont'd)

in which counsel for the witnesses sought to cross-examine Mr. Goodwin. The court declined to permit them to do so. Mr. Goodwin from the witness stand, said: "I do not wish to be subjected to cross examination." In a number of different ways, Mr. Goodwin reaffirmed that none of the 18 people who were named were government informers. (Transcript of Proceeding, United States District Court, Northern District of Florida, Tallahassee Division, In re Grand Jury Witnesses, Case No. T. Misc. No. 1/122, July 13, 1972 at Tr. 65 to 73). Excerpts reprinted infra at 22a-29a).

informer when he took the witness stand on August 17, 1973 as a major prosecution witness. Poe testified that during the period between defendant Goodwin's sworn testimony quoted above and the time of his own testimony, he reported to petitioner Meadow after each occasion that he saw or spoke with respondent Scott Camil, including every day respondents were before the grand jury.[7/]

Thus, as a direct result of defendant Goodwin's perjury in which the petitioners here are alleged to have conspired, the defense camp in United States v. Briggs, supra, was invaded in violation

7/ Petitioner Meadow was an FBI agent on the case and worked with defendant Goodwin and petitioners Stafford and Carrouth before, during, and after the grand jury period and throughout the trial.

of respondent's rights under the First, Fourth, Fifth, Sixth, Eighth, and Ninth Amendments.

Defendant Goodwin, whose official residence is in Washington, D.C., was personally served with the summons and complaint. The petitioners (Stafford, Carrouth, and Meadow) were all federal employees with offices in Florida at the time this action was commenced and when they were served by certified mail in accordance with 28 U.S.C. §1391(e).

Petitioners and defendant Goodwin all moved for a transfer or change of venue to the United States District Court for the Northern District of Florida, or in the alternative, for a

dismissal as to petitioners Stafford,[8/] Carrouth, and Meadow for a lack of jurisdiction over their persons, improper venue, and insufficiency of process. (App. at 32).

On November 20, 1974 the District Court denied the motion to transfer venue (Pet.App. at 20a-24a). But on March 4, 1975, the District Court dismissed the action as against the petitioners Stafford, Carrouth, and Meadow. It ruled that despite 28 U.S.C. §1391(e), the District Court lacked venue and *in personam* jurisdiction with respect to them (Pet.App. at 25a-26a). A final

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8/ Sometime after the filing of the complaint, petitioner Stafford became a United States District Court judge in the Northern District of Florida and petitioner Carrouth resigned from his government job. Petitioner Meadow and defendant Goodwin are still employed by the government.

judgment of dismissal was entered as to petitioners Stafford, Carrouth, and Meadow (Pet.App. at 27a).

On appeal, the Court of Appeals for the District of Columbia Circuit reversed the dismissal, holding that the clear mandate of 28 U.S.C. §1391(e) is that damage actions against federal officials may be brought in a district where a defendant resides, that venue was proper in the District Court, that extraterritorial service of process on petitioners was proper, and that the statute as thus applied to petitioners did not violate their constitutional rights. (Pet.App. at 1a-19a). The court also denied a petition for rehearing (Pet.App. at 29a) and a suggestion for rehearing en banc. (Pet.App. at 30a). It did allow

petitioners to lodge documents with the Circuit Court. (Pet.App. at 29a).[9/]

The case against defendant Goodwin is proceeding apace in the United States District Court for the District of Columbia. Defendant Goodwin has served his answer; interrogatories have been served and answered; relevant documents have been subpoenaed from the government;

9/ These documents were (1) a letter dated September 25, 1962 from Nicholas Katzenbach, Deputy Attorney General to David Bell, Director of the Bureau of the Budget, printed in the Appendix to the Government brief at 1a, (2) a memorandum dated January 18, 1963 from Deputy Attorney General Katzenbach to all United States Attorneys explaining the workings of the law as approved by the President. Annexed to this brief at 16a is a reprint of relevant portions of that memorandum, (3) a memorandum dated August 22, 1963 from John W. Douglas, Assistant Attorney General, Civil Division, to all United States Attorneys regarding a need to notify the civil division upon filing of a complaint under the new statute.

The government has lodged copies of these documents with the Clerk of this Court.

and depositions are being scheduled.

The issue posed by this case is not whether the respondents may proceed against defendant Goodwin in the District of Columbia, for that right has already been established. The issue here is whether, in the same lawsuit, respondent also may proceed against the petitioners who respondents claim were co-conspirators with defendant Goodwin. If not, then in order to proceed against the petitioners, the respondents will have to either (a) bifurcate their lawsuit, by having one proceeding in Florida, and an independent proceeding in the District of Columbia, or (b) if they wish to avoid such bifurcation, accede to defendant Goodwin's motion to move his case to Florida too.

Summary of Argument

1. 28 U.S.C. §1391(e) provides that a civil action in which a defendant is an officer or employee of the United States, acting in his official capacity or under color of legal authority, may be brought in any judicial district in which a defendant in the action resides, and the delivery of a summons and complaint may be made by certified mail beyond the territorial limits of the district in which the action is brought.

The case at bar, according to the allegations of the complaint, falls exactly within the statute.

Respondents brought their suit against the four defendants in this action in the District of Columbia, which they were authorized to do under 28 U.S.C. §1391(e). That statute represehted a major effort by Congress to facilitate suits by private individuals claiming that federal officials violated their rights.

The main thrust of petitioners' argument is that 28 U.S.C. §1391(e) is limited to mandamus-type actions and does not include damage actions.

There is nothing in the language of the statute which justifies such a reading. Indeed, it is particularly difficult to sustain such a reading in light of the fact that §1391(e) was enacted together with another statutory provision which did specifically address the question of mandamus actions (28 U.S.C. §1361). Had the Congress intended that §1391(e) should be limited to mandamus, it certainly would have said so.

Section 1391(e) carefully defines the conduct for which it provides relief as acts of a federal official "in his official capacity or under color of legal authority." (emphasis supplied). Congress was aware of the use of the latter phrase by this Court

as referring to the "misuse of power ... made possible only because the wrongdoer is clothed with the authority" of government. Classic v. United States, 313 U.S. 299 (1941). Indeed, a Deputy Attorney General had told the House Committee that damage actions could be brought against a federal official personally "for actions taken ostensibly in the course of his legal duty but which the plaintiff claims are in excess of his official duty."

Both the Court of Appeals for the District of Columbia Circuit in this case, and the First Circuit in Driver v. Helms, 577 F. 2d 147 (1978), cert. granted sub nom. Colby v. Driver, No. 78-303 (January 15, 1979), focused upon the use of the language "under color of law" as signifying a clear intent by Congress to include damage actions against federal officials in their individual capacities.

Additionally, in 1976, Congress amended §1391(e) so that it includes cases where private individuals are parties defendant in addition to federal officials. As the First Circuit explained in Driver v. Helms, supra, it would make very little sense to join someone who is not an official if the suit were limited to an action in the nature of mandamus.

This Court's decision in Schlanger v. Seamans, 401 U.S. 487 (1971) has no bearing on this case. Schlanger was a habeas corpus case where venue is controlled by specific statutory provisions which are operative under the caveat of §1391(e) "except as otherwise provided by law."

2. The legislative history completely supports the plain language of the statute. A review of that history shows that the Congress was very much aware of the issue of damage actions against federal

officials; that the Department of Justice repeatedly sought to dissuade Congress from including such actions within its new venue provisions; that Congress repeatedly rejected the requests of the Department on this score; and finally, shortly after the enactment of the statute, the Department of Justice acknowledged that the statute encompassed damage actions against federal officials personally -- exactly of the type here at issue.

In 1960, when the bill was first introduced, the Committee received an exposition from Deputy Attorney General Lawrence Walsh in which he explained the various kinds of actions against federal employees, including those in which damages are sought personally from the official "for actions taken ostensibly in the course of his official duty but

which the plaintiff claims are in excess of his official capacity."

At the time of the foregoing exposition, the bill concerned only acts taken in "an official capacity." At Hearings of the House Judiciary Subcommittee on the bill, a representative of the Department of Justice appeared and argued that such actions against officials personally should not be included. When it appeared that some members of the Committee were in fact interested in covering such actions and that consideration was being given to adding the language "under color of law," he specifically warned that such language would be interpreted to include personal damage actions against federal officials.

Following these Hearings, the Committee, despite the request of the Department of Justice, did add the language

"under color of legal authority." The Committee Report makes clear that the specific reason for that change was to meet the venue problem which "arises in an action against a government official seeking damages from him for actions which are claimed to be without legal authority but which were taken by the official in the course of performing his duty."

The bill was not enacted in 1960 but came up again in 1961. Early in 1962, then Deputy Attorney General White again recommended to Congress that it eliminate provisions which would permit suits for damages personally against government officials. Again the Congress refused to accept the advice of the Department of Justice.

Finally, three months after the Congress passed the bill, the Department

of Justice, in a memorandum distributed to all United States Attorneys, confirmed that the statute did in fact include damage actions of the type here involved.

The argument of the petitioners and the government, that Congress could not have intended §1391(e) to include damage actions because such actions were not then possible, is inconsistent with the advice that the Department was then giving to Congress. It is also an erroneous statement of the law. Personal damage actions against federal employees were possible and were being brought at the time the law was enacted.

The argument of the petitioners and the government that §1391(e) was intended to cover only mandamus actions or actions "in essence against the United States" would require the ignoring of the specific language of the Committee Report

which makes clear a Congressional intent to include damage actions. Neither the government nor the petitioners have any explanation for that language other than to say it is "odd," "enigmatic" or "isolated." In fact, the language is unmistakable and reflects a determination by Congress to reject repeated efforts by the Department of Justice to exclude damage actions against federal officials personally.

Both the Court of Appeals for the District of Columbia Circuit in this case, and that of the First Circuit in Driver v. Helms, supra, closely analyzed the legislative history in this case and confirmed that Congress did intend to include within §1391(e) damage actions of the type here involved.

3. Section 1391(e) not only provides for venue but also for service of pro-

cess by certified mail and the acquisition by the court of personal jurisdiction in that manner. Congress provided for service by mail for the specific purpose of implementing the broadened venue provisions of the bill. The provisions of the bill for service by mail were discussed by Judge Maris during the Hearings before the House Judiciary Committee. He made clear his view that such service would effect personal jurisdiction. The Congress intended that it should.

4. The application of §1391(e) to petitioners does not violate their constitutional rights. Cases dealing with limitations upon the exercise of jurisdiction by state courts can have no application to federal courts where jurisdiction has long been recognized as nationwide subject only to such limitations as the Congress may prescribe.

Even if "traditional notions of fair play and substantial justice" would limit the jurisdiction of inferior federal courts, the petitioners in this case can hardly show a denial of due process. There is in fact no burden on the petitioners; they have been and they are being represented either by government counsel or counsel paid by the government, and can hardly claim the financial difficulties of private litigants in obtaining counsel. They have not been burdened by litigating away from their home base; in fact, in almost five years of litigation in this case, petitioners personally have not been required to make a single appearance in court.

This case has been set at the seat of government, the District of Columbia, and the facts in the case did have their ori-

gin in determinations which were made in Washington, D.C. Thus The case is far different from one in which a defendant is dragged off to a jurisdiction having no nexus to the case.

Any question of possible unfairness in the choice of venue is subject to correction by the recognized discretionary power of the district court to shift jurisdiction "in the interest of justice." 28 U.S.C. §1404(a).

All the arguments of petitioners about fairness ignore completely fairness to the respondents. The petitioners are seeking to force respondents to pursue their litigation in two separate suits or to compel respondents to bring the entire litigation in a community where petitioners have substantial local influence.

Congress specifically intended that the plaintiffs in a case such as the instant one should have the choice of forum and in this case that choice is being fairly exercised.

ARGUMENT

I.

THE PLAIN LANGUAGE OF 28 U.S.C. §1391(e) ENCOMPASSES THE CAUSE OF ACTION HERE AT ISSUE

28 U.S.C. §1391(e) provides that "a civil action in which a defendant is an officer or employee of the United States ... acting in his official capacity or under color of legal authority may ... be brought in any judicial district in which (1) a defendant in the action resides ... [and] the delivery of the summons and complaint to the officer ... may be made by certified mail beyond the territorial limits of the district in which the action is brought."

The case at bar, according to the allegations in the complaint, fits exactly within the statute.

a) this is "a civil action";

b) petitioners were or are "officer(s) or employee(s) of the United States";

c) at the time of the acts complained of, each was acting in his official capacity but beyond the scope of his authority, thus fitting within "acting in his official capacity or under color of legal authority";

d) this action was brought in a judicial district in which "a defendant resides," since it was brought in Washington, D.C. where defendant Goodwin resides; and

e) "the delivery of the summons and complaint to the officer (petitioners)" was "made by certified mail beyond the territorial limits of the district in which the action is brought" -- the delivery of the summons and complaint was made by certified mail to petitioners in Florida.

Respondents laid their entire suit against all four defendants in the District of Columbia on the basis of 28 U.S.C. §1391(e) which expressly gave them authority to do so. That statute, enacted by Congress in 1962, represented a major effort by the Congress to facilitate suits by private individuals claiming that federal officials violated their rights under color of law. As the Senate and House Reports pointed out, the purpose of the new bill was "to provide readily available inexpensive judicial remedies for the citizen who is aggrieved by the working of government." (Senate Report No. 1992, 87th Cong., 2d Sess., 1962, U.S. Code Cong. and Admin. News at 2786; House Report No. 536, 87th Cong., 1st Sess, 1961, at 3; House Report No. 1936, 86th Cong., 2d Sess, 1960, at 3, hereinafter Senate Report,

House Report No. 536, and House Report No. 1936, respectively).

In this case petitioners are trying to avoid both the plain language of the statute and the intent of the legislature in passing it. Despite the articulated intent of the Congress that plaintiffs should make the choice of forum, petitioners wish to give themselves, the defendants, the option to choose the forum or to force the respondents to proceed by two separate lawsuits to vindicate the same wrong.[10/] The main basis of petition-

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10/ The strategic litigation concerns of the plaintiffs and the defendants are not difficult to discern. It is obvious why petitioners would like to move the entire case to Florida. At least two of the petitioners are persons of considerable standing in Northern Florida. One of them is a United States District Judge. Respondents, of course, want to try the case in a neutral area. Thus, the entire case boils down to whether respondents may exercise their statutory right to choose the forum.

ers' argument is the claim that despite its clear language as including civil actions without qualification, in some way §1391(e) should be read as not including damage actions and as being limited to mandamus type actions.

There is nothing in the language of the statute which limits it to mandamus actions as urged by petitioners. Indeed, in the brief submitted by the government, there is an acknowledgment that if the statute is "read broadly there is no escaping" the conclusion that, as the court below held, 28 U.S.C. §1391(e) does encompass damage actions and creates a "different" rule for federal employees being sued for damages than for other persons.

It is particularly difficult to sustain an argument that §1391(e) is limited

to mandamus actions despite the fact that Congress didn't say so, when it appears that the amendment bringing about §1391(e) was one of two sections of a public law, one of which in fact specifically dealt with mandamus type actions or actions "to compel an officer of the United States to perform his duty" (§1361). Thus, Congress certainly knew how to provide that a particular piece of legislation should be so limited if it intended that result.

Section 1391(e) appears as Section 2 of Public Law 87-784, 76 Stat. 744 which is entitled "Mandamus and Venue Act of 1962" (emphasis supplied). The first portion of the Act dealt with mandamus and its provisions are indeed embodied in 28 U.S.C. §1361 which deals with mandamus type actions. Section 2 of the Act reads as follows:

> Sec. 2 Section 1391 of title 28 of the United States Code is amended by adding at the end thereof the following new subsection.

Then follows the language which we now know as paragraph (e). If one but looks at 28 U.S.C. §1391, it will be noted that it is entitled "Venue generally." Thus Congress was providing a new paragraph dealing with venue regardless of the nature of the cause of action.

It is inconceivable that having specifically dealt with mandamus in Section 1 , Congress meant to limit Section 2 to mandamus type actions when it didn't say so -- and ordered the Section to be placed in a Code section entitled "venue generally."[11/]

11/ We believe that much of the argument that §1391e is limited to mandamus type actions derives
(fn. continued on next page)

We do not contend that §1391(e) excludes mandamus type action. It is plain, however, that the statute does not exclude damage actions. This is clear from the fact that the statute is applicable to circumstances where the official is acting "in his official capacity or under color of legal authority" (emphasis supplied). This statute was enacted within a year after the landmark case of Monroe v. Pape, 365 U.S. 167 (1961) with its extensive discussion of damage action (against

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from the accident that it is part of a statute, another section of which deals with mandamus. At the time of its enactment, it was recognized that the statute was in fact dealing with two separate subjects. Thus, then Deputy Attorney General White, writing to the Senate Judiciary Committee about the bill before its enactment, made separate comments about the two sections. After commenting about Section 1, dealing with mandamus type actions, he introduces his discussion of Section 2 as follows: "The venue provision in Section 2 covers an entirely different subject." (See Appendix, infra at 9a)

state officials) for conduct "under color of legal authority." Plainly therefore, the statute does not encompass only mandamus actions in circumstances where an official was acting within the scope of his official capacity and for which the remedy by way of either mandamus or damages may be appropriate. It also covers suits in circumstances where the official was acting "under color of legal authority," i.e. "oestensibly in the course of his official duty but which the plaintiff claims are in excess of the official authority," as outlined by then Deputy Attorney General Walsh,[12/] for which suits

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12/ The breakdown of different types of actions presented to the House Committee by Deputy Attorney General Lawrence E. Walsh when he analyzed the 1960 bill illuminates the language employed by the Committee. The Deputy Attorney General said:

> Most actions are brought against a

(fn. continued on next page)

(fn. continued from preceding page)

> public official (or Government agency either (1) to enjoin him from taking action asserted to be beyond his official authority and in violation of some legal rights of the plaintiff or (2) to seek damages from him personally for actions taken ostensibly in the course of his official duty but which the plaintiff claims are in excess of his official authority. It is a basic legal concept that both of these types of actions are against the official in his individual capacity.
>
> The only type of suit which might be brought against Government officials (or agency) in his official capacity would be the equivalent of a writ of mandamus or mandatory injunction which would compel the official to perform his duty. The Supreme Court has repeatedly upheld decisions that authority to issue a writ of mandamus to an officer of the United States commanding him to perform a specific act, required by law of the United States, rests solely with the U.S. District Court for the District of Columbia. H.R. 10059 relates only to venue and this bill would not confer mandamus jurisdiction on courts other than the district court for the District of Columbia. (emphasis supplied)

Mr. Walsh's entire letter is printed in the appendix to the brief infra at 1a. It was also

(fn. continued on next page)

for damages or for prohibitory injunctive relief are precisely appropriate and mandamus inappropriate.

The phrase "under color of legal authority" employed by the Congress in respect to this statute was in the context of the meaning of comparable language in the Civil Rights Acts as established by this court. In Classic v. United States, 313 U.S. 299 (1941) the defendants contended that "under color of law" should be interpreted to mean only official acts. The Court totally rejected that interpre-

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(fn. continued from preceding page)

printed in House Report No. 1936 at 5-6.

In Point II, infra, we show that the use of language "under color of legal authority" was in specific response to elucidation from Mr. Walsh and the explanation by a Department of Justice Attorney at the Hearings that the use of that language would cover suits where damage was being sought from the federal official because he acted outside of his legal authority.

tation stating that action taken "under color of law" is "[m]isuse of power ... made possible only because the wrongdoer is clothed with the authority of state law." Id. at 326.

This Court further clarified the definition in Screws v. United States, 325 U.S. 91, 111 (1945), a prosecution under 18 U.S.C. §242:

> It is clear that under 'color' of law means under 'pretense' of law. ... Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it. If, as suggested, the statute was designed to embrace only action which the state in fact authorized, the words 'under color of any law' were hardly apt words to express the idea. (emphasis supplied)

Accord, Williams v. United States, 341 U.S. 97, 99 (1951).

The meaning of "under color of law" having been made clear by this Court in

Classic, supra, and its progeny, the definition was known to Congress when it passed §1391(e). Given the settled definition of "under color of legal authority," its use in §1391(e) was clearly designed to include ultra vires activities and that was in specific response to the analysis made by Deputy Attorney General Walsh before the House Hearings and the testimony of Justice Department Attorney MacGuineas who appeared for the Department of Justice at the House Committee Hearings.

Petitioners claim that "under color of legal authority" was included in the statute only to avoid the sovereign immunity issue but not to cover damage actions. (Pet. Br. at 6-7, 17-18). But as this Court said in Screws, supra at 111, if the language was only intended to

cover authorized actions the "'under color of ... law [language was] hardly apt."

If the official is acting merely "under color of law," the one kind of action that would appear to be inappropriate is mandamus. For by definition mandamus involves an effort to compel an official to perform as he is duty bound to do. Where, however, an official acts merely under pretense of law -- the character of the relief sought is that which is available against any private citizen whether it be damages, declaratory relief, or injunction. The argument that the statute is limited to mandamus actions therefore has no foundation.

Congress clearly had all the foregoing in mind when it used the disjunctive language "in his official capacity or under color of legal authority" (emphasis

supplied). Both the court below, and the First Circuit in Driver v. Helms, 577 F. 2d 147 (1978) cert. granted, sub nom. Colby v. Driver, No. 78-303 (January 15, 1979), confirmed that the clear language of the statute covers damage actions. After quoting §1391(e) and discussing it, the Court of Appeals in this case said: "The suit thus fits within the ostensible coverage of §1391(e)" (Pet. App. at 5a). The court continued:

> The conscious addition by Congress of language designed to extend Section 1391(e) to suits for damages against federal officials acting under color of legal authority, coupled with its adherence to that language despite highly respectable protest, manifests beyond peradventure an intent to broaden venue in just such suits. Our duty is to harken to the will of Congress as expressed, and the statutory mandate is clear. Id. at 9a, (emphasis supplied).

The First Circuit in Driver v. Helms,

supra, said the "plain language" (Id. at 152) of §1391(e) covers damage actions such as this. The Court said:

> we must interpret the United States Code as it is written. Congress did not limit the application of §1391(e) to "[actions] in the nature of mandamus." Rather Congress used the words '[a] civil action in which each defendant is an officer or employee of the United States ... acting ... under color of legal authority.' the statute does not, by its term, limit the kind of civil action to which it applies. The case at bar is a civil action. The complaint alleges that the defendant officers of the United States were acting 'under color of legal authority'. All elements fit and we deal with a statute speaking in a highly technical field, venue and jurisdiction, where, if anywhere, precision is required.
>
> The plain language of §1391(e) covers this case, but again we would go beyond the plain language if the result were absurd or plainly at variance with congressional policies. We conclude, after considering such questions, as have many other courts, that §1391(e) should cover damage actions against officers in their individual capacities. Id. at 151-152 (footnotes omitted).

This analysis is confirmed by a 1976 amendment of the statute adding the following:

> Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

Congress thus made clear that it wanted §1391(e) applicable in cases where there were non-federal officials as defendants. To make §1391(e) clearly applicable to such cases, Congress changed the wording of §1391(e) from "a civil action in which each defendant is an officer or employee of the United States" to "a civil action in which a defendant is an officer or employee of the United States." (emphasis supplied).

The First Circuit found persuasive the fact that Congress amended §1391(e)

in 1976 for this showed that Congress understood that §1391(e) reaches personal damages actions. Driver v. Helms, supra at 154. In discussing the amendment, the court said:

> It would make little sense to join someone who is not an officer if the suit were limited to an action in the nature of mandamus. Therefore, the suit Congress was contemplating must be aimed at acts that can give rise to liability for private remedies. Ibid.

If §1391(e) is to be further amended so as not to encompass damage actions such as the instant case, Congress and not this Court is the proper body to make the change. Until and unless Congress does, this Court should interpret §1391(e) as Congress has passed it and as Congress has thus far amended it.[13/]

13/ Private counsel argue that the use of the
(fn. continued on next page)

Petitioners recognized that this Court's discussion of §1391(e) in Schlanger v. Seamans, 401 U.S. 487, 490 n.4 (1971) has little relevance to this case and

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present tense "is" and "acting" means that the statute is limited to "present, ongoing official conduct" (Pet. Br. at 14). It seems absurd to suggest that Congress would have made the venue of a suit depend on a race to the courthouse and whether the plaintiff arrives there before the official terminated his violation of the citizen's rights. An injured private citizen may have to sue in damages for past conduct, declaratory judgment relief for present or past conduct, injunctive relief to prevent conduct, or mandamus to compel conduct. The notion that Congress would have venue affected by the choice of remedies and whether the act were continuing, terminated, or terminated but likely to be resumed, and to base all of that on the supposed tense of the language employed is impossible to accept.

It is plain that the present tense describes "the defendant's official capacity at the time of the acts complained of, rather than his capacity at the time suit was filed." Govt. Br. at 13 n.9.

dealt with Schlanger in a footnote. (Pet. Br. at 11 n.3). This Court in Schlanger, supra at 490 n.4 said that §1391(e) is not applicable to habeas corpus proceedings. The government's reliance on the Schlanger case to ask for a restrictive reading of §1391(e) is misplaced. (Govt. Br. at 14). This Court noted in the Schlanger footnote referred to above that although in §1391(e) Congress provided for nationwide service of process in normal civil actions in which the defendants are officers or employees of the United States, "the legislative history of that section is barren of any indication that Congress extended habeas corpus jurisdiction." Schlanger, supra at 990 n.4. This Court has recognized that "essentially the habeas proceeding is unique. Habeas corpus practice has con-

formed with civil practice only in the general sense." Harris v. Nelson, 394 U.S. 286, 294 (1969). Whereas venue in civil actions is normally controlled by the various provisions of 28 U.S.C. §1391, venue in habeas corpus actions is controlled by the specific statutes governing habeas corpus (28 U.S.C. 2241, 2255).[14/]

14/ For example, under the provisions of §1391(a), a diversity action may be brought in a district where all the plaintiffs reside, or all the defendants reside, or the cause of action arose. By contrast, in a habeas corpus action, the district courts may issue writs only "within their respective jurisdictions," 28 U.S.C. §2241. That phrase has been interpreted to mean the district where the prisoner is in custody, when the prisoner and custodian, whose authority is challenged, are in the same district. When, however, the prisoner is in custody in one state, Alabama, and is challenging a detainer of another state, Kentucky, unlike in a diversity action, the latter would be the appropriate venue because the writ would be issuing against a Kentucky official. Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973). The matter is resolved not by turning to provisions of §1391, but by interpreting the habeas corpus statute, 28 U.S.C. §2241, itself.

Habeas corpus, then, is one of those situations expressly exempted from §1391(e) under the statute's caveat, "except as otherwise provided by law."

Thus, it is not merely that "the legislative history of [§1391(e)] is barren of any indication" that Congress intended to apply §1391(e) to habeas corpus jurisdiction, Schlanger, v. Seamans, supra at 490 n.4, but the fact that both the face of the habeas corpus statute and the actual nature of the habeas corpus remedy make it clear that habeas corpus does not fall within 1391(e).

Unlike habeas proceedings, respondents' suit against petitioners is a civil action clearly covered by the language of §1391(e). Therefore, this Court's ruling in Schlanger has no bearing on the question raised herein, i.e., the applicability of §1391(e) to damage action suits.

II

THE LEGISLATIVE HISTORY OF §1391(e) SUPPORTS ITS APPLICATION TO DAMAGE ACTIONS AGAINST FEDERAL OFFICIALS FOR ACTS UNDER COLOR OF LEGAL AUTHORITY

One of the cardinal rules of statutory construction is that when provisions of a statute "are clear and unequivocal on their face, [there is] no need to resort to the legislative history of the Act." United States v. Oregon, 366 U.S. 643, 648 (1961). See also Ernst & Ernst v. Hochfelder, 425 U.S. 185, 201 (1976); Banks v. Chicago Grain Trimmers Ass'n., Inc., 390 U.S. 459, 465 (1968); Packard Motor Car Co. v. National Labor Relations Board, 330 U.S. 485, 492 (1947); and Lewis v. United States, 92 U.S. 618, 621 (1875).

We believe that the language of the statute is so clear that there is no need

for this Court to examine the legislative history of §1391(e) in order to affirm the judgment of the court below.

Both the government and petitioners, however, by reading the legislative history in a selective and distorted manner,[15/]

15/ As we explain above (P.36 n. 11) one of the reasons the government and petitioners have been able to confuse the legislative history is because Congress was achieving two legislative objectives in one bill. (1) It amended the statute about mandamus type actions (28 U.S.C. 1361); and (2) it amended the venue statute (28 U.S.C. 1391(e)).

In our statement of the statutes involved, we have set forth the public law as it was enacted. A glance at the public law, as enacted, makes it clear that the statute did in fact involve separate objectives.

As will be hereinafter shown, references in the legislative history, clearly applicable only to what became §1361, are inapplicable to §1391(e).

argue that Congress, regardless of the language it used in §1391(e), did not intend the statute to cover damage actions. Respondents will show that, in fact, the legislative history merely confirms what we have demonstrated to be the clear meaning of the statute: that Congress was thoroughly aware of the damage action issue, deliberately chose language to express its intention to include damage actions within the bill, and, despite a specific request by the Department of Justice that it act to exclude such actions by modifying the language it was employing as the bill was progressing through Congress, declined to do so when the bill was finally enacted. We will further show that promptly after the enactment of the statute, the Department of Justice acknowledged its own understanding that Congress had in fact

included damage actions within §1391(e).

Thus, while we believe a review of legislative history is entirely unnecessary to sustain the plain language of the statute as outlined above, it is in fact clear that such a review overwhelmingly establishes that Congress intended to achieve exactly what the statute provides.

The one major point that emerges from that review is the fact that the Department of Justice at every stage of the bill's development, urged Congress not to use language that included damage actions. It also shows that Congress repeatedly rejected such proposals and suggestions which would have precluded damage actions.

We will address the legislative history in the following four phases of the development of the statute:

a) The House Committee consideration of the proposed legislation;

b) the House Committee Report and the redrafted bill show the Committee's reaction to the Department of Justice proposals;

c) the reaction of Congress to subsequent proposals from the Department of Justice; and

d) the Department of Justice's contemporaneous recognition of the impact of the statute.

A. The House Committee Consideration of the Proposed Legislation in 1960

In 1960 the House Committee on the Judiciary held Hearings on H.R. 10089,[16/]

16/ The bill provided for the amendment of 28 U.S.C. §1391 by adding the following paragraph:

> (e) A civil action in which each defendant is an officer of the United States in his official capacity, a person acting under him,

(fn. continued on next page)

86th Cong., 2d Session (1960) [House of Representatives, Hearings before the Committee of the Judiciary Subcommittee No. 4, (May 26 and June 2, 1960)(hereinafter "Hearings")[17/].

At the request of that Committee, prior to the Hearings, then Deputy Attorney General Lawrence E. Walsh wrote to the Committee about H.R. 10089, saying the bill in its proposed form would have no real effect because (1) it did not cover damage actions against federal

(fn. continued from preceding page)

> or an agency of the United States, may be brought in any judicial district where a plaintiff in the action resides.

Additional provisions related to the service of process. There was nothing in this bill which articulated a reference to "mandamus type actions." An identical bill had been introduced in 1958, but no action was taken on it. H.R. 10892, 85th Cong., 2d Sess. (1958).

17/ The transcripts of these Hearings are unpublished. The government lodged a certified copy with the Clerk of this Court.

officials for their acts outside the scope of their authority, and (2) that while it created venue outside the District of Columbia, it did not give subject matter jurisdiction to district courts outside the District of Columbia for mandamus actions (infra,Appendix A at 32-4a). This statement, which the House Committee had before it during the Hearings, a very early stage of the legislative history, shows that the Justice Department,and in turn the Committee,were fully aware of the problem of damage suits against a federal "official in his individual capacity" for acts done in connection with the official's employment but beyond the scope of the official's authority. The court below gave a similar analysis of Deputy Attorney General Walsh's letter (Pet. App. at 6a-7a). The court in Driver v. Helms, supra at 153, noted that

the Department of Justice had expressed reservations about the utility of the proposed bill because:

> Most actions against government officials, such as those seeking personal damages for acts in excess of official authority would not be covered by a bill limited to "official capacity."

Following the Committee's receipt of Deputy Attorney General Walsh's letter, Donald B. MacGuineas, Chief, General Litigation Section, Civil Division, Department of Justice, testified on both days of the Hearings for the Department of Justice. At the Hearings, he stated, "I think the committee ought to bear in mind, it apparently has assumed that this bill was intended to cover only a mandamus action." (Hearings at 31-32). Congressman Poff responded with an unequivocal "No" (Id. at 32). Committee Counsel Drabkin added

his understanding[18] (Ibid). Congressman Dowdy said, "I asked to be sure it was not limited to that. That was my purpose." (Ibid).

Justice Department Attorney MacGuineas pressed Congress not to include damage actions against government officials in their personal capacity. He warned against adoption of language which encompasses actions taken "under color of legal authority" (as some were proposing be done) saying:

> Such a bill, it seems to me, is likely to be interpreted by the courts as intending to cover the

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18/ The court below did not have access to the transcript of the Hearings which has never been printed or published. When the government obtained access to the typed copy of the Hearings transcript, it filed a copy with the First Circuit a few days before the argument in Driver v. Helms, supra. That was almost six months after the circuit decision in this case and three months after the government's petition for rehearing was denied by the court below.

> case where the citizen sues the Government official or the judge or the Congressman because he made a statement under color of his official duty." Hearings at 62.

Committee Counsel Drabkin responded: "What is wrong with that?" (Ibid). While further colloquy indicated that at the Hearings, Justice Department Attorney MacGuineas may have persuaded some members of the Committee, it is evident from the Report of the Committee and its redrafted bill that upon subsequent consideration the Committee decided not to heed the Justice Department Attorney's warning.

As we will show below, the bill that came out of the Committee specifically and deliberately added the phrase "under color of legal authority" to achieve precisely what Deputy Attorney General Walsh had outlined and what Justice Department Attorney MacGuineas had urged should not be done.

B. The House Committee Report and the Redrafted Bill Show the Committee's Reaction to the Department of Justice Proposals.

The bill that came out of the Committee, H.R. 12622, was considerably changed from H.R. 10089. We have set forth the relevant portion of the bill to graphically show the changes:

> (e) A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity, or under color of legal authority, [a person acting under him], or an agency of the United States, may be brought in any judicial district where a plaintiff in the action resides, or in which the cause of action arose, or in which any property involved in the action is situated.19/

19/ Matter added is underlined and matter deleted (not here relevant) is bracketed.

The purpose of the language changes[20/] is unmistakeable when read against Deputy Attorney General Walsh's letter and Justice Department Attorney MacGuineas' testimony. But the Committee's Report (H.R. Report No. 1936), goes further, it leaves nothing to supposition, stating:

> The Department of Justice took the position that H.R. 10089 would not accomplish the purpose for which it would appear to have been designed and the Department did not recommend enactment of that bill. As a result of the Department's comments and of hearings which were held on H.R. 10089, a new bill, H.R. 12622, was drawn which the committee believes remedies the defects pointed out by the Department of Justice. The Department has not taken an official position on the new bill although requested to do so at the hearings. House Report No. 1936 at 4.

20/ The redratted bill also required that the official being sued be served with the summons and complaint. The previous bill had allowed for service of process on the United States Attorney in the district where an action was brought. The significance of this change is obvious. A suit could not be maintained for damages from an official's pocket without providing for notice to the official being sued.

Earlier in the same report, the Committee said:

> The venue problem also arises in an action against a Government official seeking damages from him for actions which are claimed to be without legal authority but which were taken by the official in the course of performing his duty. Id. at 3.

Even without the benefit of the transcript of the House Committee Hearings, the Court of Appeals in this case recognized from the House Committee Report that Congress deliberately intended to include damage actions under the bill. The court said:

> Since H.R. 10089 would have conferred no mandamus jurisdiction and would not have applied to actions against officials "individually," the Department doubted whether its enactment "would serve any useful purpose."
>
> H.R. 12622 was drafted to meet these and other criticisms. Its first section extended mandamus jurisdiction to all of the federal district courts. Its second section broadened the prior venue proposal to include suits directed

> at a federal official's activity whether characterized as occurring "in his official capacity" or "under color of legal authority." The purpose of the new bill was "to provide readily available, inexpensive judicial remedies for the citizen who is aggrieved by the workings of Government, but who would previously have been compelled to sue in the District of Columbia by the pre-existing venue provisions, which were deemed "contrary to the sound and equitable administration of justice." And the House Report specifically noted that "[t]he venue problem also arises in an action against a Government official seeking damages from him for actions which are claimed to be without legal authority but which were taken by the official in the course of performing his duty." Pet. App. at 7a-8a (footnotes omitted).

When it wrote its opinion in Driver v. Helms, supra, the Court of Appeals for the First Circuit had access to the Hearings, hence its exposition of the developing Congressional intent is more complete. It said:

> The hearings on the bill before a subcommittee of the Committee on

the Judiciary demonstrate that at least some members of that subcommittee did not want the bill limited to a narrow purpose. For instance, at one point Mr. Drabkin, the subcommittee's counsel, stated, "I think what this bill is concerned with doing is dealing with mandamus and also dealing with petitions for review which may not properly be brought now because of some venue defect." Congressman Dowdy responded, however, "I asked to be sure it was not limited to that." Id. at 32.

Later in the same hearing Mr. MacGuineas, a representative from the Department of Justice, said he did not understand what the bill was trying to do. "In order to understand that we would have to know how this bill is intended to affect each particular type of suit that a citizen may want to bring against a Government official, and there are many different types." Congressman Dowdy responded, "Maybe we want it to apply to all suits. There is not any particular one. We want it to apply to any one." Congressman Whitener followed that up by saying, "I did not understand there was any doubt." Id. at 53-54. One type of suit hypothesized by Mr. MacGuineas was a slander suit against a congressman. Congressman Whitener indicated that he felt the bill should cover such a situation. Hearings, supra at 55,

> and he compared it to a postal worker slapping a housewife as he delivered mail. Id. at 58 Driver v. Helms, supra at 152-153 (footnotes omitted).

As to the "under color of legal authority" language the court said:

> The desire to reach a variety of causes of action prompted the first mention of the "under color of legal authority" phrase. After a discussion whether certain kinds of acts would constitute official action or not, Mr. Drabkin proposed, "Suppose in order to take care of a body of law which seems to say that when a government official does something wrong he is acting in his individual capacity, we added the following language -- 'acting in his official capacity or under color of legal authority.' That would not bring in the type of situation in which a postman, after he had gone home for the night, proceeded to run over somebody's child." Id. at 61-62. This is the first appearance of the "under color" language, and its context suggests that it was understood to exclude only those personal damage actions arising from purely private wrongs. Id. at 153 (footnotes omitted).

It is thus indisputable that the House Committee, in its draftsmanship of

the bill and in its Report, could not have been clearer in stating its intention of including damage actions against government officials acting under color of legal authority but beyond the scope of their authority.

C. The Reaction of Congress to Subsequent Proposals from the Department of Justice.

The bill, which had passed the House in 1960, was reintroduced and referred to the Senate.[21] The Senate Judiciary Committee asked for comments on it. Then Deputy Attorney General Byron R. White

21/ Although H.R. 12622 was passed in the House in 1960, the Senate adjourned without acting on it. The House Judiciary Committee republished its previous report on H.R. 12622 as House Report No. 536, to accompany the bill which was reintroduced as H.R. 1960. Some changes were made from the previous report including the omission of Deputy Attorney General Walsh's letter.

responded on behalf of the Department of Justice.[22] Once again the Department of Justice questioned the wisdom of the proposed legislation. Deputy Attorney General White's letter criticized the bill and made proposals as to each of the two sections of the bill.

First, as to the mandamus part (Section 1 of the companion bills H.R. 1960 and S. 20)[23], the Department of Justice (1) questioned the wisdom of allowing district courts outside of the District of Columbia to mandamus cabinet officers; and (2) felt it essential that the language of that

22/ Deputy Attorney General White's letter to Senator Eastland as Chairman of the Committee on the Judiciary was contained in Senate Report. The letter is printed in the Appendix to this brief, as Appendix B, infra at 6a.

23/ Because S. 20 was identical with H.R. 1960 and is not referred to by that number in either the petitioners' or government's brief, we will use H.R. 1960 for the penultimate version of the bill.

section be changed so that the mandamus power be limited "to ministerial duties owed the plaintiff." Senate Report at 2788, infra at 8a-9a.

As to Section 2, the venue provision, the Department of Justice again sought to eliminate its coverage of damage actions by suggesting that this portion of the bill be tied "directly to the Administrative Procedure Act" which "unquestionably eliminates suits for money judgments against officers...." Senate Report at 2789, infra at 10a-11a. The next recommendation was that the provision for venue in any judicial district wherein a plaintiff resides be changed to grant venue in any judicial district "'in which the cause of action arose or in which any property involved in the action is situated.'" Senate Report at 2789, infra at 11a. The Department of Justice

letter set forth the alternative language proposed for the bill. As to §1391(e) it suggested the following language:

> "(e) Except where a special statutory proceeding for judicial review relevant to the subject matter is provided in any court specified by statute, a civil action for judicial review of agency action under section 10 of the Administrative Procedure Act (60 Stat. 243, §10; 5 U.S.C. §1009) may be brought in any judicial district as above provided or in any judicial district in which the cause of action arose, or in which any property involved in the action is situated.
> "The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that delivery of the summons and complaint to the officer as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought." Senate Report at 2789-90, infra at 14a-15a.

The Department of Justice also recommended that an additional section be added to the bill to avoid misunderstanding in connection with the tax law. Senate Report at 2790, infra at 15a.

Some of the Department of Justice's proposals were adopted by Congress; another, specifically that having to do with the elimination of damage actions, was not. The mandamus section of the bill was changed from "his duty" to "a duty owed to the plaintiff or to make a decision in any matter involving the exercise of discretion." 108 Cong. Rec. 20093 (1962)(House), 108 Cong. Rec. 18782 (1962) (Senate).

At the time it reached the floor of Congress, with respect to the issue of the inclusion of damage actions, Section 2 of H.R. 1960 was in exactly the same language as that which emerged from the House Committee in 1960. It provided in pertinent part:

> A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal

> authority, or an agency of the United States, may be brought in any judicial district where a plaintiff in the action resides, or in which the cause of action arose, or in which any property involved in the action is situated.

In the course of its consideration of the bill, Congress did not eliminate venue at the plaintiff's place of residence, as the Department of Justice had suggested. Congress instead qualified the statute by adding, as the precondition to laying venue in the place of plaintiff's residence, "if no real property is involved in the action." Congress also added a provision to allow suits where "a defendant in the action resides." The first part of Section 2 of H.R. 1960 was thus amended to read as follows:

> (e) A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the

> United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action."
> (House) 108 Cong. Rec. 20093 (1962), (Senate) 108 Cong. Rec. 18783 (1962).

Congressman Forrester, who was Chairman of the subcommittee of the House Judiciary Committee that had studied the bill, explained on the floor of the House that the Senate had amended the House version and that, "The Senate amendments clarify in that they specifically provide for venue where a defendant in the action resides." (108 Cong. Record at 20094). He further explained how §1391(e) would supplement §1391(b), so that suit could be brought "wherever a defendant in the action resides." Ibid. (emphasis supplied). He also said that the venue

provisions "should apply only to the extent that venue is not otherwise provided by law." Ibid. Congressman Forrester did not include in his list of what should not be encompassed within the bill damage actions against federal officials.[24/] It thus becomes clear that the Senate Committee and the Senate and in turn the House had given careful consideration to Deputy Attorney General White's recommendations, adopted some and rejected others. They did not adopt the proposal that would have eliminated damage actions. The government argues now that this was "regrettable." (Govt. Br. at 45).

On September 20, 1962, the House and

24/ Congressman Forrester included as examples of actions not covered proceedings brought with respect to federal taxes, certain immigration proceedings, and actions against the TVA. (Ibid). Congress thus dealt with Deputy Attorney General White's concern about how the bill would be interpreted in respect to federal tax proceedings.

the Senate both passed H.R. 1960. As amended by the Senate and in turn by the House, Section 2 of H.R. 1960 became §1391(e).[25] As to the purposes of the new law, it is significant that immediately after the bill was passed, Senator Mansfield asked and received permission to print an excerpt from the Senate Report No. 1992 "explaining the purposes of the bill." 108 Cong. Record 18783 (1962) (emphasis supplied). Senator Mansfield's excerpt contained the following:

> The venue problem also arises in an action against a Government official seeking damages from him for actions which are claimed to be without legal authority but which are taken by the official in the course of performing his duty.[26] Ibid. (emphasis supplied).

25/ Both petitioners and the government argue that the bill had a single purpose -- that relating to mandamus type proceedings.

26/ This same paragraph was included in both House Reports and in the Senate Report.

It should be noted that Senator Mansfield used the plural "purposes," which makes it clear that he thought the bill had more than one purpose. Also, the paragraph he quoted speaks in terms of "seeking damages from him," i.e. from the government official whom it is claimed acted "without legal authority." It is self-evident that action "without legal authority" cannot be encompassed within a mandamus type action, which is defined as an action to compel the performance of "a duty owed to the plaintiff." 28 U.S.C. §1361.

The First Circuit in Driver v. Helms, supra, after discussing the mandamus purpose of the legislation, said:

> Even if we were to acknowledge that the primary purpose of §1391(e) was to expand venue in mandamus cases, that would not preclude it from serving other purposes as well. That it does do so and was intended to do so is indicated by the legislative history described above. Id. at 154.

The court below quite properly found significance in the fact that Congress did not adopt the Department of Justice's suggestion to eliminate damage actions from the coverage of the bill.

> The House passed H.R. 12622 but the Senate adjourned before any action was taken on it. So, in the next Congress, it was reintroduced as H.R. 1960, comments were again solicited, and again the Department of Justice asked that portions of the bill be "clarified." Some proffered clarifications were adopted, but notably the Department's suggestion that the venue provision be changed to "eliminate[] suits for money judgments against officers was not. Rather, both the House and Senate committees rejoined with the observation that the "venue problem" which the bill sought to rectify was as troublesome in damage suits against officials as in other sorts of civil litigation.
>
> This colloquy between the Department of Justice and the legislative draftsmen demonstrates the legislature's comprehension and resolution of the issue before us. The conscious addition by Congress of language designed to extend Section 1391(e) to suits for damages against

> federal officials acting under color of legal authority, coupled with its adherence to that language despite highly respectable protest, manifests beyond peradventure an intent to broaden venue in just such suits. Our duty is to harken to the will of Congress as expressed, and the statutory mandate is clear. Pet. App. at 8a-9a (footnotes omitted).

Similarly, in Driver v. Helms, supra, the First Circuit recognized the significance of Congress' rejection of Deputy Attorney General White's proposal for eliminating damage actions. The court said:

> The letter recognized that section 2 of the bill, the new §1391(e) "covers an entirely different subject" than section 1, the new 28 U.S.C. §1361, and that unless clarified §1391(e) might apply to "suits for money judgments against officers." S.Rep. No. 1992, 87th Cong., 2d Sess. (1962), 1962 U.S. Code Cong. & Admin. News, pp. 2784, 2879 [hereinafter cited as Senate Report]. Though acting on other suggestions from that letter, Congress did nothing to eliminate personal damage actions. In fact, both the House and Senate reports

state, "The venue problem also arises in an action against a Government official seeking damages from him for actions which are claimed to be without legal authority but which were taken by the official in the course of performing his duty." House Report, supra, at 3; Senate Report, supra, 1962 U.S. Code Cong. & Admin. News at 2786 (emphasis added).
Id. at 153-154 (footnotes omitted, emphasis court's).

D. The Department of Justice's Contemporaneous Recognition of the Impact of the Statute.

Some three months after the President signed the bill and it became law, then Deputy Attorney General Nicholas deB. Katzenbach wrote a memorandum dated January 18, 1963 to all United States attorneys in which he acknowledged that §1391(e) is applicable to damage actions

against government officials.[27/]

Deputy Attorney General Katzenbach wrote:

> B. The venue provision is applicable to suits against Government officials and agencies for injunctions and damages as well as suits for mandatory relief. By including in the venue provision the phrase "or under color of legal authority," the statute makes the expanded venue applicable not merely to actions for mandatory relief but also to actions in which the defendant Government official is alleged to have taken or is threatening to take action beyond the scope of his legal authority although purporting to act in his official capacity. Katzenbach Memorandum at 7, infra at 17a (emphasis in original, footnotes omitted).

27/ The relevant portions of Deputy Attorney General Katzenbach's memorandum are printed in the Appendix to this brief (infra at 16a-21a). The entire memorandum is among the documents the government lodged with the Clerk of this Court. The government (then representing petitioners) also lodged the memorandum with the court below pursuant to a motion to lodge which was granted (Pet. App. at 29a). The government at the same time had moved for rehearing with the suggestion for rehearing en banc. As the court below did not have the memorandum before it when it was considering this case, the importance of the memorandum and of the government's acknowledgment that damage actions are covered is not reflected in the opinion of the court below.

The case at bar is exactly the type of action which Deputy Attorney General Katzenbach says is covered.[28/] Deputy Attorney General Katzenbach's further discussion shows that the Department of Justice realized that Reports from both Houses of Congress said that the bill would cover damage actions against federal officials for actions taken by officials in the course of performing their duty but beyond the scope of their authority; that Congress meant to cover damage actions. The memorandum states:

> 9/ The House Report, pp. 3,4, states: "The venue problem also arises in an action against a Government official seeking damages from him for actions which are claimed to be without legal authority but which were taken by the official in the course of

28/ He cites Barr v. Mateo, 360 U.S. 564 (1959) and Howard v. Lyons, 360 U.S. 593 (1959) showing the Justice Department's continuing concern about libel and slander damage actions against federal officials.

> performing his duty . . . By including the officer or employee, both in his official capacity and acting under color of legal authority, the committee intends to make the proposed section 1391(e) applicable not only to those cases where an action may be brought against an officer or employee in his official capacity. It intends to include also those cases where the action is nominally brought against the officer in his individual capacity even though he was acting within the apparent scope of his authority and not as a private citizen."
> Katzenbach Memorandum at 7 n.9, infra at 17a-18a n.9.

The Memorandum also stated:

> This statute has no application to a suit brought against a Government official with respect to an act in the performance of which he purported to act as a private individual, not as an official. The Department does not, of course, represent Government officials in such cases.
> Katzenbach Memorandum at 7, infra at 18a-19a.29/

29/ This statement helps rebut the confusing way in which petitioners' and government's briefs attempted to persuade the Court that this case is not covered because petitioners are being sued individually. Petitioners are being sued both in

(fn. continued on next page)

Because the memorandum totally supports respondents' position, the government now claims that Deputy Attorney General Katzenbach's statements in the memorandum are "wrong." (Govt. Br. at 49 n.34).

Thus, we submit, the legislative history of this bill during two years of its reconsideration by Congress absolutely confirms the plain meaning of the language of the statute.

We now deal with the arguments made by the government and the petitioners in their attempt to answer the clear impact of both the language of the statute and

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(fn. continued from preceding page)

their individual and in their official capacities but only for acts taken under color of legal authority. They were not being sued for acts taken as private individuals. If they had been, the government would not have represented them or paid for their attorneys.

the legislative history.

1. The government (Govt. Br. at 14) and the petitioners (Pet. Br. at 11 n.3) argue that this Court's decision in Schlanger v. Seamans, supra, a habeas corpus decision, calls for a restricted interpretation of the meaning of §1391(e) in a damage action. We have answered this supra at 48.

2. The government (Govt. Br. at 16-20) and the petitioners (Pet. Br. at 16) argue that §1391(e) could not have been intended to be applicable to damage actions against federal employees, because, as the government puts it, at the time of the enactment of the statute, "[f]ederal officers were immune from suits arising out of acts taken within the outer limits of their authority." (Govt. Br. at 17). As the petitioner puts it,

"[w]hen Section 1391(e) was enacted, damage suits such as this action brought in essence against federal officials were unknown in the federal courts." (Pet. Br. at 16).

If what the government and the petitioner say were true, what was Deputy Attorney General Walsh talking about in his 1960 letter to the Committee (supra at 57-59)? What was Justice Department Attorney MacGuineas arguing about to the Committee at the Hearings (supra at 59-61)? What were the House and Senate Committees talking about in their Reports when they specifically mentioned damage actions (supra at 64)? Why was Deputy Attorney General White anxious to modify the bill to make sure that it would not include damage actions (supra at 68-71)? And finally, what was Acting Attorney General Katzenbach talking about when he notified

United States Attorneys throughout the country that 28 U.S.C. §1391 was applicable to damage suits against government officials (supra at 80-84)?

The truth is, that as of 1962 and for years prior thereto, federal officials have been subject to suit. Even petitioners admit as much four pages before they assert that such "suits...were unknown." At page 12 of petitioners' brief we read:

> "Federal officers have always been amenable to suit in actions seeking damages for wrongful acts performed under color of law, subject to the ordinary rules governing jurisdiction and venue. Note, Developments in the Law - Remedies Against the United States and Its Officials, 70 Harv. L. Rev. 827, 832 (1957); see Mitchell v. Harmony, 54 U.S. (15 How.) 115 (1852)."

The government, too, admits that such suits were brought. At p. 42 of its brief we read:

> "Such suits were brought throughout the country, and the plaintiffs had only to satisfy conventional rules of jurisdiction and venue." (Govt. Br. at 42).

As of 1962, damage suits against federal officials acting under color of law were well known. While Barr v. Mateo, supra, provided immunity in that case, this Court carefully pointed out:

> "To be sure, the occasions upon which the acts of the head of an executive department will be protected by the privilege are doubtless far broader than in the case of an officer with less sweeping functions." Barr v. Mateo, supra at 573.

As early as 1804, this Court held that the commander of a U.S. warship was liable in damages for the unauthorized seizure of a Danish vessel. Little v. Barreme, 6 U.S. (2 Cranch) 169 (1804).

Later, in Mitchell v. Harmony, 54 U.S. (15 How.) 115 (1852), this Court upheld a jury award of damages against an

army colonel who had issued an illegal order, and in favor of a citizen who lost property as a result of the illegal order. This Court said that even if the colonel had been following an illegal order of his superior officer it would not justify his conduct. It ruled that the defendant did not stand in the situation of an officer who had merely executed an order, "he advised the order, and volunteered to execute it." Id. at 137.

There are many examples of suits against federal officials. See, e.g., Colpoys v. Gates, 118 F. 2d 16 (D.C. Cir. 1941), (which held that a U.S. Marshal was not immune from suit for defamation); Kozlowski v. Ferrara, 117 F. Supp. 650, 652 (S.D.N.Y. 1954), (liability of an FBI agent for false arrest and malicious prosecution); Buck v. Colbath, 70 U.S. (3 Wall) 334 (1865), (liability of U.S.

Marshal for unauthorized seizure of property); Bates v. Clark, 95 U.S. 204 (1877), (liability of military personnel for illegal seizure of liquor from Indians); and Hughes v. Johnson, 305 F. 2d 67 (9th Cir. 1962), (federal game wardens who carry out unlawful search and seizure not immune from liability).

The fact that in 1962 most damage actions against federal officials in federal courts may have arisen under state law and were based on diversity jurisdiction cannot alter the fact that suits for damages against federal officials in federal courts were possible. The point of the statute was in fact to ease the venue and service requirements in such suits.

In fact, prior to this Court's recognition of constitutional torts in Bivens v. Six Unknown Named Agents, 403 U.S. 388

(1971),[30] diversity actions might have been the area in which §1391(e) would have proved most valuable to plaintiffs. At that time, pursuant to 28 U.S.C. §1332(a), diversity actions could be brought not only in the district where the defendant resided, thus allowing personal jurisdiction by personal service, but also in the district where the plaintiff resided, where personal jurisdiction could not be obtained without some special statutory authorization. The change in §1391(e) therefore enabled plaintiffs to seek redress in their home forum when injured by a federal official located in a different state, and to have a means of effecting

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30/ While Bivens v. Six Unknown Named Agents, supra, clarifying the basis for suits for constitutional torts was not decided until 1971, anyone reading Bell v. Hood, 327 U.S. 678 (1946) had to be aware that there was a distinct possibility that such suits would in time be recognized.

service, rather than be forced to sue in the district where that official resided.

The government suggests that diversity actions have no relevance here because service in those cases is controlled by Rule 4(f) of the Federal Rules of Civil Procedure, which, they claim, places a territorial limit on effective service. See Govt. Br. at 22 n.14. But Rule 4(f), by its terms, goes on to provide for effective service beyond the territorial limits of that state "when a statute of the United States so provides." Fed. R. Civ. P. 4(f). Obviously, 28 U.S.C. §1391(e) is just such a federal statute providing for effective extra-territorial service, and therefore broadening aggrieved plaintiffs' ability to bring damage actions against federal officials, including those based on diversity of citizenship.

3. The government claims that the statute was intended to cover only "suits seeking to compel an officer or employee to perform a duty." (Govt. Br. at 22). Petitioners similarly claim that §1391(e) is limited to actions in the nature of mandamus. (Pet. Br. at 9).

As we explained above, much of the confusion on this score results from the fact that Congress dealt with two separate matters in one statute, i.e., mandamus actions under §1 of the statute and venue generally for civil actions under §2 of the statute.

The govenrment seeks to support its argument by a review of the legislative history (Govt. Br. at 27-37) which carefully ignores all the clear demonstrations of an intention to encompass damage actions which we have discussed above. Finally, the government has to acknowledge

that the Committee did in fact say that it did intend to include damage actions. At this point, the government employs language by which it seeks simply to wave away what the Committee said. The Court is told that the reference to damage actions "is odd because...there was no venue problem in damage actions against government officials."[31/] (Govt. Br. at 42). The government continues, "The committee's statement - otherwise wholly unexplained - is enigmatic" and "is too fragile a basis" (ibid) to sustain venue in this case. (emphasis in all quotations is added).

31/ Of course there were such problems. In 1962 plaintiffs were restricted in diversity actions to the judicial district where all plaintiffs or all defendants resided. In non-diversity cases, the venue was restricted to cases where all defendants resided. The amendment to paragraphs (a) and (b) of §1391 to permit suits where the cause of action arose did not come into being until 1966 (Pub. L. No. 89-714, Sec. 1, 80 Stat. 1111.) Sec. 1391(e) eased the pre-1962 requirements very considerably in suits against federal officials. See discussion supra at 85-92.

The only enigma here is the government's argument, which ignores the language of the statute and the legislative history outlined above. This history demonstrates that the Committee knew exactly what it was doing and that it intended to include damage actions within the statute.

4. The government (Govt. Br. at 38) and the petitioners (Pet. Br. at 17) both argue that §1391(e) does not apply to a suit against a federal official unless it is "in essence against the United States," relying on the following language of the Report:

> It intends to include also those cases where the action is nominally brought against the officer in his individual capacity even though he was acting within the apparent scope of his authority and not as a private citizen. Such actions are also in essence against the United States, but are brought against the officer or employee as an individual only to circumvent what remains of the doctrine of sovereign immunity.

Petitioners and the government are reading "[i]t intends to include" to mean "[i]t intends to exclude all other" - an absurd reading of the Reports because it makes incomprehensible the following paragraph of the Committee Reports which appears on the preceding page.

> "The venue problem also arises in an action against a Government official seeking damages from him for actions which are claimed to be without legal authority but which were taken by the official in the course of performing his duty." House Report at 3.

The significant words in the foregoing statement are "seeking damages from him" (emphasis added) for acts done "without legal authority." Obviously, that does not describe a suit "in essence against the United States."

The government is aware of the inconsistence of its position, hence its effort to bury the Committee's "damage"

statement by referring to it as "odd" and "enigmatic." (Govt. Br. at 42). The petitioners cannot explain this language and so suggest that the lower court read it "in isolation." (Pet. Br, at 15).

All this comes about only because of insistence upon reading the Report so that it is inconsistent with itself whereas in fact there is no reason to read it that way.

If the Report were read for what it says -- namely that Congress intended to include actions which are in essence against the United States but also actions for damages against "him" (the official) for conduct which is "without legal authority" then there is no inconsistency and all sections of the Report are meaningful.

This reading is the only reading which gives content to the Committee's reaction to the letter of Deputy Attorney

General Walsh, to the testimony of Justice Department Attorney MacGuineas and to the letter of Deputy Attorney General White, and the subsequent memorandum of Deputy Attorney General Katzenbach.

By referring to the 1976 amendment, the First Circuit in Driver v. Helms, supra, gives a further response to this.

Obviously, by including in this statute suits against individuals who were not federal employees at all, Congress made clear that it did not read the statute as being limited to suits "in essence against the government." Supra p.47

5. The petitioner's argument (Pet. Br. at 9) that the statute was not intended to give access to the Federal courts to an action which could not prior to the statute be brought in the United States District Court for the District of Columbia, presents a confusion of the legis-

lative history based on the two-part nature of the statute as it passed Congress, supra at 36 n.11 . The intention to extend jurisdiction to District courts outside the District of Columbia applies to that part of the Venue and Mandamus Act of 1962 which became 28 U.S.C. §1361. It deals with subject matter jurisdiction in respect to mandamus. The amendment of to §1361 does indeed expand the subject matter jurisdiction of all the district courts so that their jurisdiction in mandamus actions is co-extensive with that of the District Court for the District of Columbia.

None of this concerns §1391(e) which expands venue "generally" and provides a means for the district courts to acquire in personam jurisdiction in all non-mandamus suits against federal officers or agencies which in fact were never

limited to the District of Columbia.

6. The government argues (Govt. Br. at 47) that then Deputy Attorney General Katzenbach's letter of September 18, 1962 (108 Cong. Rec. 20079) and the President's statement when he signed the bill on October 5, 1962 somehow affect the impact of that portion of the bill which amended §1391(e).

Mr. Katzenbach's letter on its face related exclusively to that portion which related to 18 U.S.C. §1361. His proposed change went exclusively, as he said, to "the language of proposed Section 1361." (Ibid).

It is significant that Deputy Attorney General Katzenbach stated in his letter that if the proposed change was adopted then the Justice Department as well as the Treasury Department would support the bill. (Ibid). It was clear

that the Justice Department was not going to get all the changes requested in former Deputy Attorney General White's letter, which also sought changes in the §1391(e) portion of the bill (discussed supra) and that the Department's prime concern remained that §1361 would be "applied to discretionary acts of Federal Officers." (Letter of Deputy Attorney General White, infra at 9a). This view of Mr. Katzenbach's letter immediately preceding the enactment of the statute is the only reading which is consistent with Mr. Katzenbach's memorandum of three months latter when he explicitly recognized that the bill encompassed damage actions.

The government insists in reading Mr. Katzenbach's letter to mean something different from what it said, which leaves no alternative but to say that Mr. Katzenbach was "wrong" in his letter of three

months later. (Govt. Br. at 49 n.34).

In the same way it is clear that the President's statement drafted by Mr. Katzenbach referred exclusively to the mandamus portion of the bill and cannot effect an amendment of the clear language of 28 U.S.C. §1391(e).

7. Petitioners argued that the lower court, in referring to the letter from then Deputy Attorney General White, was relying "upon unpreferred sources of legislative history." (Pet. Br. at 20). It is clear, however, from our discussion of the legislative history that then Deputy Attorney General White's letter brought the damage action issue clearly to the attention of both the Senators and the members of the House of Representatives before the bill in its final form was passed. Furthermore, the letter in question was but one of a series of items

all of which lead inexorably to the conclusion that Congress intended to include damage actions and said so in its Reports and in the language of the statute.[32/]

When all of the legislative history is carefully examined, there can be no doubt that Congress knew that damage actions would be covered by §1391(e) in the form in which it was passed and that Congress intended that damage actions should be covered.

32/ While the petitioners criticize the lower court for relying upon what they consider to be "unpreferred sources of legislative history" they rely upon a statement of the original sponsor who introduced a bill which referred only to official actions - ignoring that it was the House Committee that added the phrase "or under color of legal authority."

III

THE STATUTE PROVIDES A MEANS OF ACQUIRING IN PERSONAM JURISDICTION THROUGH SERVICE BY CERTIFIED MAIL.

It is clear that the language of §1391(e) provides a means for obtaining personal jurisdiction over federal officials as well as delineating where venue shall be proper in such suits. The relevant part of §1391(e) provides:

> ... delivery of the summons and complaint to the officer ... as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

That is exactly how petitioners were served in this case, and such service gave the District Court personal jurisdiction over them.

We turn now to an argument made by petitioners, though seemingly no supported

by the government, i.e., that even if §1391(e) is considered applicable to damage actions, it provides venue but does not provide for personal jurisdiction -- which petitioners claim must be acquired by some means other than the service by certified mail as provided by the statute.

Petitioners attempt to brush away the clear language of the statute by maintaining that it governs nothing more than the mechanics of service and represents nothing more then a statement as to where process can be delivered. Petitioners in effect ask this Court to add to the actual language of the statute "only when in personam jurisdiction is otherwise independently established." (Pet. Br. at 18). Congress did not put that qualification into the language of the statute.

There is no doubt that in mandamus type actions against federal officials,

personal jurisdiction can be acquired over such officials through service under §1391(e). Implicit in petitioners' argument is that, when damages are sought from the pocket of a federal official, §1391(e) cannot be used to secure personal jurisdiction, but that if mandamus relief is sought precisely the same language can be used to meet service requirements.

Aside from the incongruity of dealing with service differently depending on whether the cause of action is for damages or for mandamus, the main difficulty with petitioners' argument is that it finds no support in the language or the legislative history of the statute. Beyond that, the Committee Reports explain that the provisions for service by mail were inserted for the specific purpose of providing a mechanism for effective service over federal officials beyond the terri-

torial limits of the State in which a district court where a case is brought is located. The statute allows extra-territorial service on federal officials, thus implementing the new venue provisions. It is absurd to suggest that personal jurisdiction needs some additional foundation.

Thus, the 1960 House Report No. 1936[33] says:

> In order to give effect to the broadened venue provisions of this bill, it is necessary to modify the service requirements under the Federal Rules of Civil Procedure insofar as they apply to actions made possible by this bill. Rule 4(f) restricts effective service to the territorial limits of a State in which the district court is held unless a statute specifically provides for it to go beyond the territorial limits of that State. Since this bill is designed to make a federal official or agency amenable to suit locally, the bill provides that the delivery of the summons and complaint to the offi-

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33/ This same paragraph is also contained in the 1961 House Report No. 536 at 4.

> cer or agency may be made by certified mail outside of the territorial limits of the district in which the action is brought. In all other respects, the summons and complaint is to be served as provided by the Federal Rules of Civil Procedure.[34/] (emphasis supplied)

Clearly "amenable to suit" (ibid) means getting personal jurisdiction over the official.

In §1391(e), Congress provided for more generous venue provisions than had previously existed and also provided for personal service by certified mail, thus making those new venue provisions usable

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34/ As we explained, supra at 63,n.20,the provisions for service of process were modified when the House altered the venue provisions to include suits against officers acting "under color of legal authority." Under the original version of the bill, only the United States Attorney had to be served; but when the statute was broadened in scope,necessarily provision had to be made for service on the individual, since his own pocket could be involved.

and effective. It would have been a useless act to provide for broader venue and not to take proper steps to provide for personal jurisdiction as well. The court below agreed that the provisions for extra-territorial service of process fit within the wording of the statute. The court said:

> [W]hile the amended section retains the rules intact for service within the forum district it empowers the district courts to make valid service outside the district whenever venue lies by virtue of Section 1391(e). It also authorizes service by certified mail in such situations whenever service can be effected only beyond the boundaries of the forum district. Nowhere is there any intimation that these changes were to affect some cases controlled by Section 1391(e) and not others, and indeed any exception would be difficult to justify. That venue exists in a particular district would hardly console a plaintiff unable to serve officials who, though responsible for his plight, had withdrawn beyond the limits of effective service. And Congress must not have been content to rely simply on state long-arm statutes, for it

> chose to supplement them in the category of cases encompassed by Section 1391(e) by providing extra-territorial service of its own device. We find the service effected here to be fully within the ambit of congressional contemplation. Pet. App. at 13a-14a (footnotes omitted).

The First Circuit in Driver v. Helms, supra, 577 F. 2d at 156, agreed, saying: "to the same extent that §1391(e) supplies venue, it supplies the mechanism to secure personal jurisdiction." (Ibid.)

In the Driver v. Helms case, the court pointed out that the provisions for service of process were discussed by Judge Maris at the House Hearings. He said:

> Now what you would have to do here it seems to me would be to provide for the service that we discussed, namely, service upon the U.S. Attorney, service by mail upon the Attorney General, and also service by mail anywhere in the United States upon the officer or agent being sued.
>
> That would take care of it

> because all that is necessary is for Congress to authorize service to be made outside of the District, and it is perfectly valid to do so. Hearings at 88-89. Driver v. Helms, supra at 156.

As the First Circuit Court explained:

> Congress, following Judge Maris' suggestion, provided nationwide service of process by mail and expected that broadening service would correspondingly broaden personal jursidiction. Ibid.

Other circuit courts and district courts agree with the court below and with the First Circuit in Driver v. Helms, supra, that §1391(e) does provide that in personam jurisdiction may be acquired by service of process by certified mail in the manner provided for by §1391(e). See Liberation News Service v. Eastland, 426 F. 2d 1379, 1382 (2nd Cir. 1970), United States ex rel Garcia v. McAninch, 435 F. Supp. 240, 244 (E.D.N.Y. 1977), Environmental Defense Fund, Inc. v. Froehlke, 384 F. Supp. 338, 364 (W.D. Mo. 1972)

aff'd on other grounds, 477 F. 2d 1033 (8th Cir. 1973); American Civil Liberties Union v. City of Chicago, 431 F. Supp. 25, 30-31 (N.D. Ill. 1976); Maceas v. Finch, 324 F. Supp. 1252, 1254-55 (N.D. Cal. 1970). U.S. ex rel Rudick v. Laird, 412 F. 2d 16 (2nd Cir. 1969), and Smith v. Campbell, 450 F. 2d 829 (9th Cir. 1971), the two §1391(e) cases relied on by petitioners for the contrary position, i.e., that §1391(e) does not provide a method for acquiring in personam jurisdiction, are both habeas cases which are governed by special limitations. See discussion, supra at 48.

Deputy Attorney General Katzenbach in his "Memorandum to all United States Attorneys"[35/] written shortly after the

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35/ The relevant portions of Deputy Attorney General Katzenbach's Memorandum are printed in Appendix C to this brief at 16a-21a, and discussed in Point II, supra.

the statute was passed, also recognized that the provisions of §1391(e) for service by certified mail "modifies Rule 4(f) F.R.C.P., so as to enable service to be made on the Government official or agency named as a defendant outside the state in which the district court is held," infra at 19a (footnote omitted).

There is no question of the correctness of the statement of the First Circuit in Driver v. Helms, supra at 155.

> If Congress, by §1391(e), authorized service of process beyond the geographical limits that F.R.Civ.P. 4(f) would otherwise impose, and if such service does not violate the Constitution, then service was properly made in this case, and the court properly acquired jurisdiction over the persons of the appellants.

IV.

THE APPLICATION OF §1391(e) TO PETITIONERS IN THIS CASE DOES NOT VIOLATE THE PRINCIPLES OF DUE PROCESS.

Petitioners argue that the interpretation given to §1391(e)by the court below would render its application to petitioners unconstitutional and deprive petitioners of due process of law. Petitioners' argument is essentially the same as that which the government (then representing petitioners) unsuccessfully presented to the court below. In its new role as amicus, the government has reversed its previous position and, realizing that the success of petitioners' argument "would require at least some [other federal] statutes to be declared invalid" (Gov't. Br. at 2, n. 1), concedes that there is no Due Process Clause violation in the application of §1391(e) to the instant case.

Petitioners' argument really amounts to claiming that it "is fundamentally unfair" (Pet. Br. at 24) to subject them to a forum with which they have "no nexus" (Ibid) and that "because of the intolerable burden on their right to defend" (Id. at 25) they "are deprived of fifth amendment due process." (Id. at 24-25).

Petitioners acknowledge that (Pet. Br. at 25 n.8) as this Court held in Robertson v. Railroad Labor Board, 268 U.S. 619, 622 (1925), "Congress clearly has the power to authorize a suit under a federal law to be brought in any inferior federal court" and that the Court has reaffirmed that position in Mississippi Publishing Corp. v. Murphee, 326 U.S. 438 (1946) and in Yakus v. United States, 321 U.S. 414 (1944). (Pet. Br. at 25 n.8). Their argument thus comes down to a claim

that the Fifth Amendment imposes due process limitations on the power of Congress to determine where suits may be brought in the federal courts. Petitioners' argument that §1391(e) would be unconstitutional if interpreted as covering damage actions is without merit.

As long ago as 1838, this Court said in Toland v. Sprague, 12 Pet. 300, 37 U.S. 300, 328:

> Congress might have authorized civil process from any circuit court to have run into any State of the Union.

Accord, Robertson v. Railroad Labor Board, supra. In §1391(e), Congress, by permitting service of process anywhere in the United States in cases such as the instant case, did precisely what this Court said Congress could constitutionally do.

Petitioners concede (Pet. Br. at 26), as they must, that they canot rely on the

territorial sovereignty aspect of International Shoe Co. v. Washington, 326 U.S. 310 (1945) and of related cases. Obviously, territorial limitations upon the exercise of state court jurisdiction cannot govern the federal courts.

Petitioners argue, however, that Congress' power to legislate with respect to in personam jurisdiction of the federal courts is limited by "traditional notions of fair play and substantial justice" concerning procedural due process and the right to defend.

The court below rejected that argument [35] stating:

> Nor do we perceive any constitutional problem in the statute as applied to this case. Appellees [petitioners here] pitch their constitutional argument on their supposed lack of minimum contacts

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35/ At that time, petitioners were represented by attorneys from the Department of Justice.

with the District of Columbia, resting on cases holding 'that the Due Process Clause of the Fourteenth Amendment places some limit on the power of state courts to enter binding judgments against persons not served with process within their boundaries.' To the extent that this position presupposes that Congress' constitutional authority to provide for the sound operation of the federal judicial system is limited by the same constraints that apply to extraterritorial service by state tribunals, it builds on sandy soil indeed. . . . While several cases have asserted apodictically that service outside a federal judicial district is governed by the same sort of 'fairness standard' as is extraterritorial service by state courts, this imputes a constitutional magic to lines that Congress can at any time redraw. As tradition alone works no such necromancy, we must reject appellees' constitutional argument as well. Pet. App. at 14a-18a, (footnotes omitted).

The First Circuit came to the same conclusion, stating:

> The United States, however, whose court is here asserting jurisdiction, does not lose its sovereignty when a state's border is crossed. The Constitution does not require the federal districts to follow state boundaries. That decision was made by Congress, and Congress could change its mind. Driver v. Helms, supra at 156.

The First Circuit said about the problems of minimum contacts:

> We see no reason why the United States does not have the same power over defendants within its borders [as a state does over persons found within its borders]. Even if we were to say minimum contacts had to be established, anyone found and served within the United States would have sufficient contacts with the United States. Id. at 156 n.25.

The Seventh Circuit, in its recent opinion in Fitzsimmons v. Barton, 589 F. 2d 330 (1979), rejected an attempt to impose the "fairness" standard and accompanying procedural due process limitations laid down in International Shoe Co., supra, and Shaeffer v. Heitner, 433 U.S. 186 (1977), as a constitutional limitation on the exercise of federal jurisdiction.

The court said:

> Although Shaffer and International Shoe speak directly only of state court jurisdiction, the broad articulation of a fairness standard (in opposition to a territorial standard) in both opinions requires a further inquiry to determine what, if any, restrictions Due Process imposes on federal jurisdiction over persons.
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> * * *
>
> It is clear, therefore, that the 'fairness' standard immposed by Shaffer relates to the fairness of the exercise of power by a particular sovereign, not the fairness of imposing the burdens of litigating in a distant forum. Fitzsimmons v. Barton, supra at 332-33. (footnotes omitted),(emphasis supplied).

Even if "traditional notions of fair play and substantial justice" would limit the jurisdiction of inferior federal courts, the petitioners can hardly show a denial of Due Process in this case for the following separate and distinct reasons.

We start with the general proposition

pointed out by the First Circuit in Driver v. Helms, supra at 157, where the court said:

> We note that officers of the federal government are different from private defendants because they can anticipate that their official acts may affect people in every part of the United States.

What is more, as this Court recognized in Bivens v. Six Named Unknown Agents, supra, "an agent acting -- albeit unconstitutionally -- in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own." Id. at 392.

As applied to the instant case, petitioners' arguments as to fair play and justice have a particularly hollow ring.

A. The actual burden upon the petitioners in this case is quite ephemeral. Whatever may be the situation in other

cases, here the government has furnished or paid for petitioners' counsel, who function out of either Washington, D.C. or New York.

Originally, petitioners were represented by Department of Justice attorneys. The Solicitor General decided not to apply to this Court for certiorari, but the government agreed to pay the fees and expenses of private counsel to seek certiorari from this Court for petitioners. The government continued to act as counsel in the case in the District Court until several months after the petition was filed in this Court. Petitioners' contention that some federal employee may not be defended by the Department of Justice is too hypothetical to require the attention of this Court. Unlike a private citizen who is a defendant, federal officials, when named as defendants, have the full resources of the government

at their disposal. Not only do petitioners have private attorneys at taxpayers' expense, but the government has submitted a lengthy amicus brief on their behalf as well.

Respondents are being represented by unpaid counsel provided by the Center for Constitutional Rights. In Colby v. Driver, supra, the case being argued in tandem with this case, respondents are being represented by unpaid counsel provided by the American Civil Liberties Union. However, most plaintiffs do not have the same benefit. On the other hand, prospective defendants can always be assured of free counsel at government expense.

Petitioners further raise the specter that defendants will be burdened by repeated appearances in a far away jurisdiction in "lengthy" litigation such as this.

This case has been litigated since 1974 and petitioners, in their role as defendants, have never once appeared at a single proceeding nor have they ever been asked or required to appear. What is more, should the District Court determine that it is too burdensome for defendants to be deposed in Washington, D.C., the place where the court hearing this case is located, the court could direct that plaintiffs take defendants' depositions in defendants' home district.

B. This suit against federal officials is being brought at the seat of government and within the district where one of the defendants has his office and where petitioners' department headquarters are located. This is hardly a case where respondents arbitrarily chose a far-away district which had no real meaning in terms of the case itself.

When an action such as this is brought at the seat of the federal government and charges government officials with conspiring together to deprive citizens of their rights, the District of Columbia is a proper forum. A statute designed to relieve citizens from <u>having</u> to sue in the District of Columbia should not be turned on its head to <u>prevent</u> citizens from coming here.

C. There is nothing "local" about the instant case. If the Department of Justice had considered the underlying criminal matter out of which it arose to be a local (Florida) matter, the Department would not have sent defendant Guy Goodwin "as a Special Attorney under the authority of the Department of Justice" (Letter on July 7, 1972 from Ralph E. Erickson, Deputy Attorney General appointing Guy Goodwin of the Internal Security

Division, Department of Justice, Washington, D.C., as Special Attorney in the Northern District of Florida) to act in Florida in connection with the grand jury and trial out of which this case arose.

The Fifth Circuit in its recent decision in United States v. Briggs, 514 F. 2d 794, 805-806 (1975),[36] recognized the connection between the grand jury and criminal trial of respondents and the

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36/ That case involved an application which was denied by the Florida District Court but granted by the Fifth Circuit to strike the names of respondent Robert Wayne Beverly and John Chambers (now a plaintiff in the ongoing suit in the District Court against defendant Goodwin) from the criminal indictment in United States v. Briggs, supra at 5, 5 n. 2. The two had been named in the indictment as unindicted co-conspirators. At the time the application was made, the eight respondents who were named as defendants in the indictment had already been tried and found not guilty by a jury.

countrywide federal government prosecutions of anti-war activists and other disfavored persons and groups. United States v. Briggs, supra at 805 n.18, 806.

The Fifth Circuit said:

> There is at least a strong suspicion that the stigmatization of appellants was part of an overall government tactic directed against disfavored persons and groups. Id. at 806.

The Fifth Circuit, in its opinion striking the names of Beverly and Chambers from the indictment, cites Note, Federal Grand Jury Investigation of Political Dissidents, 7 Harv. Civ. Rts-Civ. L. Rev. 432 (1972). The note states:

> [U]se of federal grand juries to investigate the activities of political dissidents [was] [l]argely engineered and coordinated by the Justice Department's Internal Security Division . . . Ibid. (footnotes omitted).

The note repeatedly refers to the involvement of defendant Goodwin, head of the

Special Litigation Section of the Internal Security Division in grand jury investigations throughout the country.

D. District courts can transfer cases where necessary in the interests of justice. As pointed out by the First Circuit in Driver v. Helms, supra at 157:

> We acknowledge that these appellents may have to answer complaints in a broader range of judicial districts than would non-governmental defendants. But they are not without protection. A district court has broad discretionary power '[f]or the convenience of parties and witnesses, in the interest of justice, [to] ... transfer any civil action to any other district ... where it might have been brought.' 28 U.S.C. §1404(a). We would expect courts to be sympathetic to motions for change of venue when defendants would otherwise be substantially prejudiced and when there is an alternative venue that would protect the parties' rights.

Thus, the power of the district court to effect a change of venue in an appropriate case is the obvious safety valve to complaints of unfairness.[37/]

Petitioners, who express much concern about fairness for themselves, seem to have little concern about fairness for the respondents. What petitioners are really seeking is that respondents, who were brought from many far away states to Florida to defend themselves before a grand jury and in a criminal trial, must bring two separate suits to vindicate their rights -- one in Florida against petitioners and one in the District of Columbia against defendant Goodwin -- even though the defendants are charged with acting in concert. Alternatively, if re-

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37/ Petitioners' change of venue motion was denied by the District Court (Pet. App. at 20a-24a).

spondents want one suit, they must sue in the jurisdiction where petitioners have most impact upon jurors and judges.[38/]

These are rather perverted notions of "fairness." The Congress' main concern when it enacted this legislation was to consciously ease the litigation burden upon plaintiffs suing federal officials. See discussion supra at 32. By their arguments, petitioners have sought to turn the matter around so that the citizen may have to run all over the country, bear the expense of a far away forum or unnecessarily multiple lawsuits, and be relegated to an unfavorable forum -- all to serve the convenience of the defendants.

38/ See supra at 33 n.10.

Petitioners are defining "fairness" for their own narrow benefit to "pick" a forum favorable to themselves. When the enormous power of government has been misused by federal officials who have gone beyond the scope of their authority and who have used the color of official authority to violate the rights of citizens, it is not fairness to make it as hard as possible for citizens to seek redress in the courts. That was what the Congress well understood.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

U.S. Department of Justice,
Office of the Deputy Attorney General,
Washington, D.C.

Hon. Emanuel Celler,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Justice concerning H.R. 10089, a bill to permit a civil action to be brought against an officer of the United States in his official capacity, a person acting under him, or an agency of the United States, in any judicial district of the United States where a plaintiff in the action resides.

This bill seeks to permit civil actions to be brought by a plaintiff in the district in which he resides, against officers of the United States in their

official capacity, a person acting under such official, or an agency of the United States. The bill further provides that service on such defendant may be accomplished by delivering a copy of the summons and complaint to the U.S. attorney, or to his designee, in the district in which the action is instituted.

Most actions are brought against a public official (or Government agency) either (1) to enjoin him from taking action asserted to be beyond his official authority and in violation of some legal rights of the plaintiff or (2) to seek damages from him personally for actions taken ostensibly in the course of his official duty but which the plaintiff claims are in excess of his official authority. It is a basic legal concept that both of these types of actions are

against the official in his individual capacity.

The only type of suit which might be brought against a Government official (or agency) in his official capacity would be the equivalent of a writ of mandamus or mandatory injunction which would compel the official to perform his duty. The Supreme Court has repeatedly upheld decisions that the authority to issue a writ of mandamus to an officer of the United States commanding him to perform a specific act, required by the law of the United States, rests solely with the U.S. District Court for the District of Columbia. H.R. 10089 relates only to venue and this bill would not confer mandamus jurisdiction on courts other than the district court for the District of Columbia.

Inasmuch as the types of actions which could be instituted by a plaintiff against an official are limited as set forth above, it does not appear that the enactment of H.R. 10089 would serve any useful purpose.

Further, with regard to the provisions in the bill for service upon Government officials and agencies, rule 4(d) (4) and (5) of the Federal Rules of Civil Procedure requires that a summons and complaint must be served upon an officer or agency of the United States, not only by delivery of a copy to the U.S. attorney for the district in which the action is brought as provided in Section 2 of the bill, but also by sending a copy of the summons and complaint by registered mail to the Attorney General and by delivering a copy of the summons and complaint to

the sued officer or agency. Those additional requirements provide, of course, a more effective method for insuring that the defendant himself will promptly receive notice of the suit against him than do the provisions of this bill.

On the basis of the foregoing, the Department of Justice is unable to recommend enactment of this legislation.

The Bureau of the Budget has advised that there is no objection to the submission of this report.

Sincerely yours,

Lawrence E. Walsh,
Deputy Attorney General.

APPENDIX B

Department of Justice,
Office of the Deputy Attorney General,
Washington, D.C., February 28, 1962.

Hon. James O. Eastland,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

Dear Senator:

This is in response to your request for the views of the Department of Justice on identical bills S. 20 and H.R. 1960 (H.R. 1960 passed the House on July 10, 1961) to amend chapter 85 of title 28 of the United States Code relating to the jurisdiction of the U.S. district courts, and for other purposes, and related bill S. 717 to authorize civil actions for the review of administrative determinations as to the use of lands of the United States for grazing purposes to be instituted in judicial districts in which

such lands are situated, and for other purposes.

The pending companion bills, H.R. 1960 and S. 20, are general in scope and as to purpose, similar to S. 717 which relates to determinations concerning the issuance of grazing permits only. If the companion bills, or modified versions thereof, are passed by the Congress, consideration of S. 717 would appear to be unnecessary because the problems it seeks to meet are adequately covered in the broader proposals.

Section 1 of the companion bills (H.R. 1960 and S. 20) would extend to all U.S. district courts jurisdiction to issue writs in the nature of mandamus.

This Department questions the wisdom of authorizing district courts generally to mandamus Cabinet officers and other

Government officials who are presently suable, if at all, only in the District of Columbia. However, if either S. 20 or H.R. 1960 is to be given further consideration by the Congress, the provisions of the bills should be clarified.

While the stated purpose of section 1 is to extend the mandamus powers of the District Court for the District of Columbia to the several district courts throughout the Nation, the language of the section is dangerously broad. Courts interpreting the mandate to require a Federal officer "to do his duty" might find a much greater power intended than the existing mandamus power in the District of Columbia court to which the proposed statute does not refer explicitly or implicitly. We think it essential that the section refer to the "mandamus" power

and specifically limit its exercise to ministerial duties owed the plaintiff. Should the language be applied to discretionary acts of Federal officers, the judicial branch would be invading the executive or legislative function in violation of the doctrine of separation of powers. Clearly the judiciary can compel executive action (or legislative action) only where there is an absolute obligation to act in connection with which no discretion exists.

The venue provision in section 2 covers an entirely different subject. Under present law, after one has exhausted his administrative remedies, the final decision is generally made by an official residing in the District of Columbia. To challenge the legality of that decision, the officer residing in Washington must

be sued in Washington. The purpose of this section of the bill is to have officers who live in the Capital subject to suit throughout the country to the same extent that they can now be sued in the District. In effect, then, this venue provision would do away with the defense that a superior officer is an indispensable party because with a grant of venue, a superior officer can be made a party.

The Administrative Procedure Act contains an expression of existing congressional purpose relating to review of the acts of Federal officers. For venue reasons, however, practically all proceedings for review under that act must be brought in the District of Columbia. We believe that less confusion will result by tying in this simple venue grant directly to the Administrative Procedure

Act. This unquestionably eliminates suits for money judgments against officers, eliminates any question that a discretionary action can be reviewed, and requires an exhaustion of administrative remedies. It will do away with any possible future contention that the legislation was intended to add any additional substantive right of appeal. It would thus achieve what we understand to be the purpose of the sponsors within the framework of existing legislation.

The pending bill would place venue in any judicial district "wherein the plaintiff resides." We recommend that this be changed to grant venue in any judicial district "in which the cause of action arose, or in which any property involved in the action is situated." The principal demand for this proposed legis-

lation comes from those who wish to seek review of decisions relating to public lands, such as the awarding of oil and gas leases, consideration of land patent applications and the granting of grazing rights or other interests in the public domain. The applicants may reside in any State, or several States of the Union, and it would be unwise to have the Secretary sued in Maine with respect to an oil and gas lease in Wyoming. On the other hand, there is no objection to permitting one who has done business involving land in Wyoming to bring any suit concerning that land in the State where it is located.

Without recommending legislation in this field, we have drafted revised language to accomplish the purposes stated for the subject bills, which contains minimal safeguards to the national inter-

est in management of the public domain, in maintenance of separation of powers, and to minimize fruitless litigation. As to the provision conferring mandamus jurisdiction, it is recommended that a new section 1361 of title 28 of the United States Code proposed to be added by section 1 of S. 20 and H.R. 1960 be revised to read as follows:

"§ 1361. Action in the nature of mandamus

"The district courts shall have jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or of any agency thereof to perform a ministerial duty owed to the plaintiff under a law of the United States."

As to the provision for venue, it is recommended that the new subsection (e)

proposed to be added to section 1391 of title 28 of the United States Code by section 2 of the bill be revised to read as follows:

"(e) Except where a special statutory proceeding for judicial review relevant to the subject matter is provided in any court specified by statute, a civil action for judicial review of agency action under section 10 of the Administrative Procedure Act (60 Stat. 243, § 10; 5 U.S.C. § 1009) may be brought in any judicial district as above provided or in any judicial district in which the cause of action arose, or in which any property involved in the action is situated.

"The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that delivery of the summons and complaint

to the officer as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought."

In order that there may be no misunderstanding in connection with administration of the tax laws of the United States, it is recommended that an additional section be added to the bill as follows:

"§ 3. This Act shall not apply to proceedings brought with respect to Federal taxes."

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely yours,

Byron R. White,

Deputy Attorney General

APPENDIX C

DEPARTMENT OF JUSTICE

WASHINGTON, D.C.

January 18, 1963

Memo No. 337

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

Subject: Public Law 87-748, 76 Stat. 744, approved October 5, 1962.

* * *

This law will no doubt result in a substantial number of suits being brought in your districts against Government officials. The following material should be helpful in defending such suits.

* * *

B. The venue provision is applicable to suits against Government officials and agencies for injunctions and damages as well as suits for mandatory relief. By including in the venue provision the phrase "or under color of legal authority," the statute makes the expanded venue applicable not merely to actions for mandatory relief but also to actions in which the defendant Government official is alleged to have taken or is threatening to take action beyond the scope of his legal authority although purporting to act in his official capacity.[9/] See

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9/ The House Report, pp. 3, 4, states: "The venue problem also arises in an action against a Government official seeking damages from him for actions which are claimed to be without legal authority but which were taken by the official in

(fn. continued on next page)

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579; Philadelphia Co. v. Stimson, 223 U.S. 605. As an example, suits for damages for alleged libel or slander by Government officials (which the Department defends on the ground that statements made by a Government official within the scope of his authority are absolutely privileged; Barr v. Matteo, 360 U.S. 564; Howard v. Lyons, 360 U.S. 593) fall within the venue provision of this statute. This statute

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(fn. continued from preceding page)

the course of performing his duty ... By including the officer or employee, both in his official capacity and acting under color of legal authority, the committee intends to make the proposed section 1391(e) applicable not only to those cases where an action may be brought against an officer or employee in his official capacity. It intends to include also those cases where the action is nominally brought against the officer in his individual capacity even though he was acting within the apparent scope of his authority and not as a private citizen."

has no application to a suit brought against a Government official with respect to an act in the performance of which he purported to act as a private individual, not as an official. The Department does not, of course, represent Government officials in such cases.

* * *

Service of summons and complaints. The final paragraph of this law modifies Rule 4(f), F.R.C.P., so as to enable service to be made on the Government official or agency named as a defendant outside the state in which the district court is held.[12/] It is still essential

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12/ The House Report, p. 4, provides: "In order to give effect to the broadened
(fn. continued on next page)

that a copy of the summons and complaint be delivered to your office, that a copy be sent to the Attorney General by regis-

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(fn. continued from preceding page)

venue provision of this bill, it is necessary to modify the service requirements under the Federal Rules of Civil Procedure insofar as they apply to actions made possible by this bill. Rule 4(f) restricts effective service to the territorial limits of a State in which the district court is held unless a statute specifically provides for it to go beyond the territorial limits of that State. Since this bill is designed to make a Federal official or agency amenable to suit locally, the bill provides that the delivery of the summons and complaint to the officer or agency may be made by certified mail outside of the territorial limits of the district in which the action is brought. In all other respects, the summons and complaint is to be served as provided by the Federal Rules of Civil Procedure.

It is contemplated that where an action is only nominally brought against an official, as an individual, service may be had in the manner provided by Rule 4(d)(5). The exception to the territorial limitation on service provided in this bill would, of course, be equally applicable to that situation."

tered mail, and that a copy be delivered by certified mail to the defendant Government official or agency. Rule 4(d)(4)(5), F.R.C.P. Unless these requirements are complied with, the district court does not have jurisdiction over the defendant. Messenger v. United States, 231 F. 2d 328 (C.A. 2).

* * *

Nicholas deB. Katzenbach

Deputy Attorney General

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

IN RE: GRAND JURY WITNESS)
)
CASE NO. T MISC. 1/222)

C A P T I O N

The above-entitled matter came on to be heard before the Honorable David L. Middlebrooks, United States District Judge, at the U.S. Post Office Building, Tallahassee, Florida, on the 13th day of July, 1972, commencing at 10:37 A.M.

A P P E A R A N C E S

JAMES REIF, NANCY STERNS, DORIS PETERSON, and JACK LEVINE, 588 Ninth Avenue, New York, New York 10036, appearing on behalf of the Grand Jury witnesses.

CAMERON CUNNINGHAM, 502 West Fifteenth Street, Austin, Texas 78701 appearing on behalf of the Grand Jury

witnesses.

JUDY PETERSEN, 115 South Main Street, Gainesville, Florida 32601, appearing on behalf of the Grand Jury witnesses.

STEWART J. CARROUTH, Assistant United States Attorney, WILLIAM STAFFORD, United States Attorney, GUY GOODWIN, Assistant States Attorney, and STARK KING, Assistant United States Attorney, U.S. Post Office Building, Tallahassee, Florida, appearing on behalf of the Government.

Reported by
JERRY L. ROTRUCK
FEDERAL COURT REPORTER
P.O. BOX 928
TALLAHASSEE, FLORIDA
224-0722

[Tr.] 65

* * *

THE COURT:

Mr. Goodwin, take the witness stand. Swear the witness, Mr. Clerk.

Whereupon,

GUY GOODWIN

was called as a witness, having been first duly sworn to speak the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE COURT:

Mr. Goodwin, are any of these witnesses represented by counsel agents or informants of the United States of America?

THE WITNESS:

No, Your Honor.

THE COURT:

You can step down.

(Witness excused.)

MR. LEVINE:

Your Honor, may we be permitted to question Mr. Goodwin on this?

THE COURT:

No, unless you have some information that is [Tr. 66] contrary to what counsel for the Government has testified.

MR. LEVINE:

Might I just ask one question, Mr. Goodwin, does your representation apply to each and every of the named individuals as to whom this motion is made, including --

THE COURT:

That question was asked.

MR. GOODWIN:

Your Honor, I will answer the question the Court posed. I do not wish to be subjected to cross examination.

THE COURT:

You are not going to be. I have asked the question.

MR. LEVINE:

Your Honor, may I also ask whether Mr. Goodwin might represent to the Court whether or not he has caused any inquiries to be made by those with whom he has associated as to whether or not any of our clients have been used as informants, in this case.

THE COURT:

Well, now, I hope Mr. Goodwin understands that my question covered that. If he knows --

MR. GOODWIN:

I assumed that it did, Your Honor.

* * *

[Tr.] 71

* * *

MR. LEVINE:

As I understand the Court's ruling and representation by Mr. Goodwin that as to his own personal knowledge he is not aware or has no knowledge that any of our clients are being used as informants is being accepted by the Court as sufficient for the purposes of our motion.

Let me please state that it is our position that irrespective of the good faith of Mr. Goodwin's representation that we should be entitled to question him as to what, in fact, he knows about these witnesses, when he got into the case and how others perhaps unknown to him may be using the informants as to whom he has absolutely no knowledge. I am simply stating that for the record and asking that our objection be noted on that score.

THE COURT:

Mr. Goodwin, you, I assume, would have knowledge as to whether, from contacts with various agencies any of these represented witnesses are informants.

MR. GOODWIN:

I would assume so, Your Honor, yes,

MR. REIF:

[Tr.72] Your Honor, if I might suggest, that is one of the most unequivocated answers I have ever heard. While it is true, Mr. Goodwin may have knowledge --

THE COURT:

I may be in error, Mr. Reif, and if I am I can be corrected. I recognize obligations of an attorney to his client. I would bar the use of informers paid by the Government, represented by attorneys, I would abhord [sic] the use of those who might over hear conversations between counsel and other clients. I feel that

I have sufficiently inquired into the question as to whether any of these represented clients are informants, and I am going to deny the application for the disclosure of the names of informants.

[Tr. 1-2,65-66,71-72]